Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TERRY JOHNSON,

Petitioner,

v.

WEST SUBURBAN BANK,
COUNTY BANK OF REHOBOTH BEACH,
DELAWARE, TELE-CASH, INC., ,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL A. EDELMAN
Counsel of Record
CATHLEEN M. COMBS
JAMES O. LATTURNER
JOHN M. BRODERICK
EDELMAN, COMBS, & LATTURNER
120 S. LaSalle Street
18th Floor
Chicago, IL 60603
(312) 739-4200

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Is there an inherent conflict between compelling arbitration pursuant to 9 U.S.C. § 1 *et seq.* and the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*, and other consumer protection statutes because these statutes specifically provide for class action relief as a method of enforcement and class actions cannot be brought in arbitration?

PARTIES TO THE PROCEEDINGS

This petition involves an appeal from the United States Court of Appeals for the Third Circuit in *Johnson v. West Suburban Bank*, 99-cv-00104. The following is a list of all parties to the proceeding whose judgment is sought to be reviewed:

Terry Johnson, Plaintiff-Petitioner

West Suburban Bank, Defendant-Respondent

County Bank of Rehoboth Beach, Delaware, Defendant-Respondent

Tele-Cash, Inc., Defendant-Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Terry Johnson, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

PREVIOUS OPINIONS

The citations of the official and unofficial reports of the opinions and orders entered in these cases are as follows:

The United States Court of Appeals for the Third Circuit reversed and remanded the decision of the United States District Court for the District of Delaware. *Johnson v. West Suburban Bank*, 225 F.3d 366, 00-5047 (3rd Cir. Aug. 29, 2000) (attached as *Appendix A*).

The United States District Court for the District of Delaware denied defendants' motion to compel arbitration. *Johnson v. West Suburban Bank*, 82 F. Supp. 2d 264 (D. Del. 1999) (attached as *Appendix B*).

STATEMENT OF JURISDICTION

The Third Circuit reversed and remanded the decision of the District Court for the District of Delaware denying the motion to compel arbitration of respondents in *Johnson v. West Suburban Bank*, 99-cv-00104. *Johnson v. West Suburban Bank*, 225 F.3d 366, 00-5047 (3rd Cir. Aug. 29, 2000). Petitioners now timely seek a writ of certiorari with regard to the decision of the Third Circuit. This

Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes are set forth in *Appendix C* to this Petition: Federal Arbitration Act, 9 U.S.C. § 1 et seq., Truth in Lending Act, 15 U.S.C. § 1640(a), and the Electronic Fund Transfer Act, 15 U.S.C. § 1693m.

STATEMENT OF THE CASE

A. Statement of Facts.

On July 10, 1998, Johnson applied for and received a short-term loan in the amount of $250 from the County Bank of Rehoboth Beach. The one-page loan agreement set forth an annual percentage rate of **917.71%** and a finance charge of $88. As a result, Johnson was required to repay his $250 loan by making one payment of $338 on July 24, 1998 – two weeks after he submitted his loan application and received the $250.

In addition, the loan agreement provided a "boiler plate" arbitration clause which, in relevant part, reads:

> ARBITRATION: You and we agree that any claim, dispute, or controversy between us . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . . , including the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration. . . .

> This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16. Judgment upon the award may be entered by any party in any court having jurisdiction.
>
> * * *
>
> NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.
>
> By signing and sealing below, you agree to all of the terms of this Note, including the agreement to arbitrate disputes.

In connection with the transaction at issue, plaintiff received and/or signed standard printed forms, including a combination note, TILA disclosure statement and Loan Payment Instruction Form. By using such documents, defendants conditioned the extension of credit on its repayment by means of an electronic funds transfer.

The loans would be repeatedly rolled over and only payments for interest are wired. Compulsory repayment by electronic funds transfer is essential to making this long-distance loan. The EFTA prohibits such requirements. 15 U.S.C. § 1693k. Thus, defendant's entire method of doing business is inherently unlawful. *See Moseley v. Electronic & Missile Facilities, Inc.*, 374 U.S.167 (1963).

In addition, these standard form documents fail to comply with the requirements of TILA, 15 U.S.C. §§ 1632 & 1630 and 12 C.F.R. §§ 226.17 and 226.18 because the

annual percentage rate and finance charge are not more conspicuous than any other terms. Plaintiff further alleges that defendants' loan transactions are unconscionable.

B. Proceedings Below.

Petitioner Terry Johnson filed this suit as a class action against respondents Tele-Cash, Inc. ("Tele-Cash"), and County Bank of Rehoboth Beach, Delaware ("County Bank") under the Electronic Fund Transfer Act, 15 U.S.C. § 1693 et seq. ("EFTA"), and the Truth in Lending Act, 15 U.S.C. § 1601 et seq. ("TILA"). The parties voluntarily dismissed defendant West Suburban Bank.

Respondents Tele-Cash and County Bank moved to stay the proceedings and to compel arbitration pursuant to the above quoted arbitration clause. The District Court for the District of Delaware denied respondents' motion concluding that there was an "inherent conflict" between compelling arbitration and the TILA and EFTA statutes. The respondents appealed this order to the Third Circuit Court of Appeals pursuant to 9 U.S.C. § 16(a).

As the Third Circuit stated, no other federal appellate court has squarely addressed whether a court can compel arbitration of TILA and EFTA claims when the parties' loan agreement contains an arbitration clause but the plaintiff seeks to bring his claims as a class action. Petitioner's argument focused on the ability of a class action award to act as a penalty against lenders who violate the TILA. The Third Circuit acknowledged that "[t]his focus is logical." 225 F.3d at 373. Although the court recognized that this argument, and the argument that Congress

meant to encourage private attorneys general to enforce compliance through the use of class actions carry force and are supported by the legislative history of the statutes, the Third Circuit held that compelling arbitration would not conflict with the TILA or EFTA, even though petitioner's claims could not be brought as a class action and certain substantive remedies would not be available in arbitration.

This Court granted Johnson leave to file an amicus curiae brief in *Green Tree v. Randolph*, 99-1235.

REASONS FOR GRANTING THE PETITION

I.

THIS CASE PRESENTS AN IMPORTANT, UNRESOLVED QUESTION OF LAW

Supreme Court Rule 10(c) provides that a factor favoring certiorari is that "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

The *Johnson* decision involves questions of exceptional importance in that the Third Circuit has held in effect that a creditor may avoid TILA and EFTA statutory penalties in class action suits by means of an arbitration clause. The District Court held, pursuant to the analysis set forth in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), that this outcome

presents an inherent conflict between the TILA and EFTA and arbitration and denied arbitration. The Third Circuit reversed.

This Court granted certiorari and has heard argument in *Green Tree v. Randolph*, 99-1235, which also presents an issue regarding TILA and arbitration. This demonstrates that the Court already views this to be an important issue. However, should the Court not reach the merits in *Green Tree*, or the issue of class actions and arbitration, the Court should grant certiorari here.

Also, the lower courts (including the Third Circuit) have been applying this Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) to mean that class actions are not a bar to arbitration. However, in *Gilmer*, the plaintiff was not paying for the arbitration. Here, consumers are being asked to pay arbitration costs *and* give up their right to proceed as a class action, which is a mechanism that allows costs to be spread over numerous borrowers' cases. Without clarification, the lower courts will continue to apply *Gilmer* erroneously.

Finally, the proliferation of short term loans with extremely high interest rates in this country gives rise to concerns about low-income consumers having their rights violated without an effective remedy. TILA and EFTA specifically provide for civil fines in class actions not exceeding the lesser of $500,000 or 1% of the net worth of the defendant. This remedy is unavailable in arbitration.

A. The Payday Loan Industry.

The last decade has seen the rise of the short term loan industry. These lenders specialize in lending relatively small amounts of money for extremely high interest rates to low income borrowers. The loans are generally made for two-week periods, i.e. until the borrowers next payday, hence they are popularly known as "payday loans."

Studies by the Departments of Financial Institutions for Illinois and Indiana show that most of these loans are repeatedly rolled-over (i.e. extended or renewed past the original two-week due date) – more than 90% of the time – and that there is a high default rate. *See also* Report to the 101st General Assembly on the Deferred Presentment Services Act, Department of Financial Institutions for the State of Tennessee ("a customer might end up paying $500.00 to pay off a $100.00 loan").

A survey of the payday loan industry published by the Consumer Federation of America shows that the most common APR is over 350%. *See* "Show Me the Money," Consumer Federation of America, February 2000. The loans usually contain additional fees, such as "bounced check fees" and the borrower becomes mired in perpetual debt. The study also cites the use of abusive collection activities on the part of lenders.

B. The Pervasiveness of Arbitration Clauses.

The inclusion of arbitration clauses, commonly utilized (and designed for) employment disputes or

commercial disputes, has become more common in transactions involving consumers. They are now frequently used in payday loan agreements (examples of arbitration clauses in other short-term, high-interest loans are included in *Appendix D*). It is paradoxical to expect a person who is borrowing an amount of money under $500 at an interest rate of over 500% APR to rationally agree to forego their right to utilize the courts, a forum funded by the public, in exchange for using a forum such as arbitration which is partially funded by the debtor. The use of arbitration clauses insulates these lenders from liability in class actions (1% of their net worth up to $500,000) under TILA, EFTA and other consumer protection statutes.

C. Johnson Is an Amicus in *Green Tree v. Randolph*.

It should be noted that this Court granted Johnson leave to file an amicus curiae brief in *Green Tree v. Randolph*, 99-1235. *Green Tree* also presented the Court with the problems caused by arbitrating a consumer claim, however, that case focused on the costs involved. The Court has not addressed the issue presented here as to whether there is an "inherent conflict" between arbitrating a statutory claim, which would prevent bringing the claim as a class action, where the statute *encourages* the use of class actions to vindicate its purpose and policies.

II.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

A. If Compelling Arbitration Creates an "Inherent Conflict" With Another Statute, The Statutory Claim Should Not Be Arbitrated.

This Court's opinions in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987) held that when dealing with statutes that evince a contrary congressional mandate, "*deducible* from text or legislative history," arbitration is precluded on those claims. *Mitsubishi*, 473 U.S. at 628 (emphasis added). This intent is "deducible from . . . an inherent conflict between arbitration and the statute's underlying purposes." *McMahon*, 482 U.S. at 227.[1]

In *Gilmer v. Interstate/Johnson Lane Corp.*, this Court held that "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in an arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (quoting *Mitsubishi*

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[1] This is consistent with the long-standing principle of statutory construction that the implications of one statute may be altered by the implications of a later statute. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 2000 U.S. LEXIS 2195, No. 98-1152, 2000 WL 289576, at *13 (Mar. 21, 2000); *Healthcare v. Watson Pharmaceuticals, Inc.*, 2000 U.S. App. LEXIS 6200, *20 n.3 (2d Cir. April 4, 2000); *Sunshine Health Systems v. Bowen*, 842 F.2d 1097, 1101 (9th Cir. 1988); *In re Johnson*, 787 F.2d 1179, 1182 (7th Cir. 1986). Of course, this is not the same as arguing that a prior statute was repealed by implication by a later statute.

Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (quotations omitted).

Where the arbitration clause would be a barrier to a litigant's exercise of his or her statutory rights, the arbitration clause is unenforceable. *Randolph v. Green Tree Financial Corp.*, 178 F.3d 1149, 1157 (11th Cir. 1999) *cert. granted, Green Tree Financial Corp. v. Randolph*, ___ U.S. ___, 120 S. Ct. 1552 (2000); *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054,1062 (11th Cir. 1998) ("When an arbitration clause has provisions that defeat the remedial purpose of [a] statute, . . . the arbitration clause is not enforceable").

"[A]rbitration of statutory claims works because potential litigants have an adequate forum in which to resolve their statutory claims and because the broader social purposes behind the statute are adhered to. This supposition[ ] falls apart, however, if the terms of an arbitration agreement actually prevent an individual from effectively vindicating his or her statutory rights. Accordingly, an arbitration agreement that prohibits use of the judicial forum as a means of resolving statutory claims must also provide for an effective and accessible alternative forum." *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234 (10th Cir. 1999).

As noted previously, the lower courts (including the Third Circuit) have applied the holding in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) to mean that the inability to bring class actions in arbitration is not a bar to arbitration. However, in *Gilmer*, the plaintiff was not paying for the arbitration. In this case, the consumer is required to pay arbitration costs *and* give up

their right to proceed as a class action which is a mechanism that helps defray the cost of litigation. Without clarification, the lower courts will continue to apply *Gilmer* erroneously.

Gilmer is further distinguishable because it involved different statutory language in the Age Discrimination in Employment Act, 29 U.S.C. § 621 ("ADEA"). That statute did not provide for a civil fine obtainable through class actions like TILA and EFTA. The EEOC, the agency charged with enforcement of the statute, was authorized to bring class actions. Finally, the ADEA does not evince a strong policy favoring class actions, whereas TILA does, in that the ADEA does not authorize a Fed. R. Civ. P. 23 class action, but only allows for an opt-in class action. Since the ADEA does not manifest a strong policy in favor of class actions, there was no "inherent conflict" in arbitrating statutory claims under ADEA. As discussed below, TILA *does* have a strong policy in favor of class actions and so there is an "inherent conflict."

Congress specifically provided for class action relief when enacting TILA, 15 U.S.C. § 1640, and EFTA, 15 U.S.C. § 1693m. Class relief is beyond the power of an arbitrator. *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). If an arbitrator cannot grant the relief specified in TILA, the TILA claim cannot be subject to arbitration. *See Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Central Ltd.*, 154 F.3d 404 (7th Cir. 1998). Even where the claim is of a type which can normally be arbitrated, if the arbitrators are deprived of the ability to afford complete relief, the particular arbitration clause cannot be enforced. *Hooters of America, Inc. v. Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998).

In *Cole v. Burns Int'l Security Services*, 105 F.3d 1465, 1481-82 (D.C. Cir. 1997), the court emphasized that an arbitration clause cannot be used to deprive persons protected by the law of their substantive rights:

> The starting point of our analysis is the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In that case, the Court held that an employee's agreement to arbitrate employment-related disputes may require him to arbitrate statutory claims under the ADEA because "by agreeing to arbitrate a statutory claim, [an employee] does not forgo the substantive rights afforded by the statute; [he] only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628) (first alteration in original). As noted above, the Court emphasized that "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Id.* at 28 (quoting *Mitsubishi*, 473 U.S. at 637) (alteration in original). . . .
>
> Obviously, *Gilmer* cannot be read as holding that an arbitration agreement is enforceable no matter what rights it waives or what burdens it imposes. See *Gorman*, 1995 U. ILL. L. REV. at 644 ("The Supreme Court in the *Gilmer* case did not hold that any sort of arbitration procedure before any manner of arbitrator would be satisfactory in the adjudication of public rights."). Such a holding would be fundamentally at odds with our understanding of the rights accorded to persons protected by public statutes like the ADEA and Title VII. The beneficiaries of public

> statutes are entitled to the rights and protections provided by the law. Clearly, it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination. [citation] Any such condition of employment would violate Title VII, regardless of whether or not the agreement was viewed as a contract of adhesion. Thus, in a subsequent suit by the employee raising a viable claim of racial discrimination or sexual harassment, it would be no defense that the employee had signed a contract giving up her right to be free from discrimination.
>
> Similarly, an employee cannot be required as a condition of employment to waive access to a neutral forum in which statutory employment discrimination claims may be heard. . . . At a minimum, statutory rights include both a substantive protection and access to a neutral forum in which to enforce those protections. See *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246-48 (9th Cir. 1994) (arbitration clause that purported to waive remedies provided by federal statute and to shorten statute of limitations for filing such claims violated statute and was unenforceable); JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 144-45 (1983) (preservation of "individual rights requires an accessible legal system for their protection" and enforcement). . . .

Cole further held that "[t]he premise of the [Supreme] Court's rulings . . . is that arbitration entails only a waiver of a procedural right to a judicial forum rather than a waiver of any substantive right accorded by the statute. *Id.*, at 1483, quoting S. Estreicher, Arbitration of

Employment Disputes Without Unions, 66 CHI.-KENT L. REV. 753, 791 (1990).

The inconsistency between the substantive statute and arbitration need not be express. As the Seventh Circuit held in *Baltimore & Ohio Chicago Terminal R. Co. v. Wisconsin Central Ltd., supra,* 154 F.3d at 410-11, "No provision of the Interstate Commerce Act expressly forbids the arbitration of claims under the Act. But the cases we have cited hold that the statutory prohibition need not be express to be effective; as in other cases of preemption, it is enough if allowing arbitration would disrupt the statutory scheme." *See also McMahon,* 482 U.S. at 227 (whether there is an "inherent conflict" is "deducible" between arbitration and the statute's underlying purposes).

B. The Purpose Of The Class Action in Consumer Protection Laws.

Congress has had genuine concerns about the lack of nationwide compliance with TILA and other consumer protection laws. The purpose of the class action remedy was to ensure such compliance. *See* S. Rep. 93-278 at 14-15 ("The Committee believes a maximum class action liability of $100,000[2] is sufficient to deter potential violations and achieve widespread compliance."). Without this class remedy, the penalty imposed by Congress would be evaded and the consumer protection statutes would lose their sting.

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[2] Later this section was amended upward to $500,000.

1. The Purpose of TILA.

It is evident that Congress, in enacting the 1974 amendments to TILA, intended to create a private attorney general class action right for the express purpose of "insur[ing] nationwide adherence to uniform disclosures" and providing a vehicle by which courts can "assess a meaningful penalty upon a creditor to induce compliance with" TILA's requirements. S. Rep. 93-278, 14-15.

A substantial amount of legislative history is available which demonstrates Congress thoroughly evaluated its options for enforcement and purposefully incorporated class actions into its scheme for enforcement by "private attorney generals." In 1974, Congress amended § 1640 to provide a cap on liability for class actions brought under TILA. *Watkins v. Simmons & Clark*, 618 F.2d 398, 400 (6th Cir. 1980); *Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1119-20 & n.10 (D.Haw. 1976).

This amendment was in direct response to courts' reluctance to certify classes under TILA. One can draw a historical comparison here to the passing of the FAA, which was intended by Congress to address the reluctance of the courts to enforce arbitration clauses. Clearly, the statutes create a conflict as to what the courts are directed to do because to enforce the arbitration clause is to forego the class action remedy. Under the analysis in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) and *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), arbitration creates an "inherent conflict" with TILA and the arbitration must not be enforced.

Prior to the 1974 amendment, a plaintiff was entitled to a minimum award of $100 under the statute. *See* 15 U.S.C. § 1640 (1970). Without the cap, if a class action lawsuit involved millions of consumers, a defendant creditor would be liable for "an astronomical damage figure." For this reason, numerous courts found class actions *not* to be a superior method of adjudication because of the extreme penalty. The courts found this to be "inconsistent" with the "remedy Congress prescribed as the means of private enforcement." *See Ratner v. Chemical Bank of New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972).

In response to these decisions, Congress amended the statute to provide a limit on the maximum recovery available under the TILA. This amendment was intended to encourage the federal courts to begin certifying class actions in Truth in Lending lawsuits. S. Rep. 93-278, at 14-15 (1973); *Watkins*, 618 F.2d at 400 n.6; *Bantolina*, 419 F. Supp. 1116, 1119-20 & n. 11.

It was Congress's express intent to encourage the use of class actions as an enforcement mechanism. *See Watkins*, 618 F.2d at 401 & n.7 (citing S. Rep. 94-590, *reprinted in* 1976 U.S. Code Cong. & Admin. News, at 431, 438). While the amendment limited the exposure of creditors to the lessor of $500,000 or 1 per centum of their net worth, it provided "a workable structure for private enforcement." *Id.* Congress concluded the cap to be a sufficient deterrent against a creditor of any size.

Congress decided that the statute would be enforced privately, and with class actions, *not* by a federal agency, such as the FTC. "The purpose of the civil penalties

under [the] Truth in Lending [Act] was to provide creditors with a meaningful incentive to comply with the law without relying on an extensive new bureaucracy." S. Rep. 93-278, at 14. In this case, an agency is not effectively structured to do so, which Congress recognized and instead opted to encourage individuals to bring class actions. *See Watkins v. Simmons & Clark, Inc.*, 618 F.3d 398, 400 (6th Cir. 1980) (holding that the intended purpose of the TILA was to encourage class actions in the truth-in-lending context because of the apparent inadequacy of the Federal Trade Commission's enforcement resources) (citing S. Rep. 93-278, at 14-15).

It is important to note that Congress intended TILA remedies to be punitive in nature, rather than compensatory. Class actions under a statute such as the ADEA involved in *Gilmer* are accumulating individual claims, whereas TILA class actions seek to impose statutory damages determined in the same manner as a criminal fine. Congress characterized the statutory damages provision as "the civil penalties section." S. Rep. 93-278, at 14.

Section 1640 provides that "In determining the amount of award [of statutory damages] in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional." The damages are thus assessed in the same manner as a *fine or punitive damages*, and the classwide statutory damages are

not merely a convenient means of enforcing the individual rights of numerous class members. Because this penalty is similar to a fine, defendant should not be allowed to escape its effects by contract.

The purpose of the cap was to provide a meaningful incentive to effectuate compliance with the law and yet make the penalty reasonable. S. Rep. 93-278 at 14. Congress, concurring with the Federal Reserve Board, found that potential class action liability was an important encouragement to the voluntary compliance which was so necessary to ensure nation-wide adherence to uniform disclosure since most Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to ensure compliance. S. Rep. 93-278, at 15. This is why it has been held that class-action exposure is "essential to the prophylactic intent" of TILA. *Bantolina*, 419 F. Supp. at 1120. This is what gives the statute its "sting." *Id.*

Thus there is ample evidence of Congressional intent to conclude that "Congress did intend . . . to encourage class actions and to use the threat of class action recoveries to force compliance with the Act." *See Appendix* (District Court Opinion) at 31-32 (quoting *Watkins*, 618 F.2d at 402). The legislative history for TILA is more developed and expansive than a "general statement of legislative purpose." *See Pritzker v. Merrill Lynch*, 7 F.3d 1110, 1119 (3d Cir. 1993).

The legislative history for TILA and EFTA is quite specific. Congress repeatedly modified the statute for the express purpose of "encouraging class actions." The Senate Report reveals that Congress engaged in a thorough

investigation and analysis in order to counter judicial hostility to TILA class actions and effectuate the goal of national uniform compliance. This is the same sort of legislative history that was relied on in *Sues v. John Nuveen & Co., Inc.*, where it was held that Congress had expressed its intent to "encourage" arbitration in the context of the Civil Rights Act of 1991. *Sues v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 n.1 (3d Cir. 1998). Therefore, defendants' argument that the legislative history is insubstantial must be rejected.

Compelling arbitration precludes the class relief included in TILA and EFTA. *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995). This would strip the federal statute of its "sting" and reduce it to nothing more than its mere nuisance value. Creditors will not be provided with a "meaningful incentive for compliance" since they would not be facing a "meaningful penalty provision." S. Rep. 93-278 at 14, 15. Congress determined this to be an effective and desirable means of vindicating the statute's cause of action and that class actions served a meaningful remedial and deterrent function.

While the statute does not provide an *automatic* right to $500,000 worth of class relief (for obvious due process concerns), it cannot be ignored that Congress intended for class relief to be part of its statutory scheme. "By enforcing the boiler plate arbitration clause which is contained in this (and every other) one-page loan agreement unilaterally drafted by the defendants, the court would be allowing them to effectively insulate themselves against the very statutory penalties which Congress deemed necessary to 'provide creditors with a meaningful incentive to comply with the law.' " *See Appendix*

Johnson, 82 F. Supp. 2d at 271 (*Appendix B*) (quoting S. Rep. 93-278, at 14); *see also Powertel, Inc. v. Bexley*, 743 So.2d 570, 576 (Fla. App. Ct. 1999) ("The arbitration clause also effectively removes Powertel's exposure to any remedy that could be pursued on behalf of a class of consumers . . . Class litigation provides the most economically feasible remedy for the kind of claim asserted here. The potential claims are too small to litigate individually . . . The prospect of class litigation ordinarily has some deterrent effect on a manufacturer or service provider, but that is absent here . . . "). Congress recognized the special efficacy of class actions, which has also been recognized by the courts. *Crawford v. Equifax Payment Services*, 201 F.3d 877, 880 (7th Cir. 2000) (small-stakes consumer claims are best filed as class actions); *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997); *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 809 (3d Cir. 1995).

For example, Johnson could only recover a maximum of $1,000 statutory damages, *see* 15 U.S.C. §§ 1640(a)(1)(2)(A), whereas, as a representative of a class, he could obtain 500 times that amount. Enforcing the arbitration clause raises doubts as to whether TILA could serve both its remedial and deterrent functions. S. Rep. 93-278, at 14.

Congress need not discuss and reject all other options of enforcement. "[T]he cases we have cited hold that the statutory prohibition need not be express to be effective; as in other cases of preemption, *it is enough if allowing arbitration would disrupt the statutory scheme.*" *Baltimore & Ohio Chicago Terminal*, 154 F.3d 404, 410 (7th Cir. 1998). TILA provides for class actions and judicial enforcement

for exactly the same reasons that the Interstate Commerce Act at issue in *Baltimore & Ohio* confided certain tariff issues to the Surface Transportation Board – nationwide compliance and uniformity are essential. The statutory scheme here is to allow suit by "private attorney generals" and create liability of up to $500,000 or 1% of net worth for noncompliance.

In fact, because Congress has expressly "encouraged" arbitration of other statutory causes of action, principles of statutory interpretation support the argument that if Congress intended to encourage arbitration of statutory rights it could do so. *See Sues v. John Nuveen & Co., Inc.*, 146 F.3d 175, 182 (3d Cir. 1998) (discussing Section 118 of the Civil Rights Act of 1991).

To conclude that arbitration precludes Johnson's pursuit of his class action claim is to say he waived this remedy under TILA. This is precisely what Congress intended to prevent by providing that it is unlawful to discriminate against the exercise of any right under the Consumer Credit Protection Act. 15 U.S.C. § 1691(a)(3).

In *Parker v. DeKalb Chrysler Plymouth, supra*, 673 F.2d 1178, 1182 (11th Cir. 1982), the court held that a general release did not apply to TILA claims. In so holding, it stressed that TILA is imbued with a public purpose with individuals and their attorneys serving as private attorneys-general. The specific grant of the right to bring class action litigation is part of enforcing that public purpose. If, as in this case, defendants were allowed to bypass the class action device through the use of arbitration clauses, congressional attempt would be stymied.

"Before *Gilmer*, courts had unanimously found that any waiver, including a knowing waiver, of statutory rights was precluded. In *Gilmer*, the Court established the baseline test that 'so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent functions.' " *Hooters of America*, 39 F.Supp. 2d 582, 616 (D.S.C. 1998), quoting *Gilmer*, 500 U.S. at 28. Recognizing this concept, the Court of Appeals in *Tran v. Tran*, 54 F.3d 115 (2d Cir. 1995), held that statutory rights under the Fair Labor Standards Act could not be made the subject of binding arbitration. This decision affirms the validity of *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945), which the court relied upon in *Parker v. DeKalb Chrysler-Plymouth*, 673 F.2d 1178 (11th Cir. 1982), to hold that TILA rights were not the subject of a general release. Further, even the individual suit under Truth-in-Lending has public dimensions. *See Buford v. American Finance Co.*, 333 F. Supp. 1243, 1248 (N.D.Ga. 1971).

Additional public-related benefits are provided by the stare decisis effect successful litigation may have entitling others to statutorily provided relief. *Id.*; *Accord*, *Rodash v. AIB Mortgage Co.*, 16 F.3d 1142 (11th Cir. 1994) ("Congress intended the statute to create a system of private attorneys general to aid its enforcement; thus, to further its remedial purpose"). Reported decisions are important to the stated purpose of having standardized disclosures on a nationwide basis. No matter where you are in the country, you should get the same form disclosures. This requires reported decisions with reasons spelled out and subject to appellate review. The Court

found reported decisions expendable under ERISA, *see Pritzker*, 7 F.3d at 1119, but under ERISA every plan can be different. The purpose of TILA requires uniform disclosures which necessitates reported, precedential law which is not available under private arbitration.

In *Broughton v. Cigna Healthplans of California*, 21 Cal. 4th 1066, 988 P.2d 67 (Cal. 1999), the court would not enforce an arbitration clause because it impeded the ability of plaintiff to "[play] in the role of a bona fide private attorney general" as intended by the California legislature in the California Legal Remedies Act (CRLA). *Broughton*, 988 P.2d at 76-77. Similarly, here, arbitration would impede the public benefit Congress intended by encouraging plaintiffs to bring class action suits as private attorney generals to enforce uniform compliance with TILA. The court in *Broughton* distinguished its holding from the outcome in *Mitsubishi Motors*, which held that the Sherman Act's treble damages provision only had an "incidental" public benefit. In *Broughton*, the intent to create "private attorney generals" and ability to obtain injunctive relief had a more tangible public benefit and was clear expression of legislative intent that suits brought under the CRLA were to have a public benefit rather than only compensate the plaintiff individually.

Similarly here, by encouraging plaintiffs to bring class actions for statutory damages, Congress intended for TILA to have a more tangible public benefit rather than merely compensate the individual. Given this legislative intent, putting Johnson's claim in a forum that prevents the bringing of a class action defeats the legislature's intent. The conflict between the FAA and TILA

need not be express but can be, and is, deducible from the text and legislative history.

C. TILA's Private Attorney Generals.

Certainly, class actions are part of TILA's statutory scheme of enforcement by "private attorney generals." Compelling a claim alleged as a class to be arbitrated as an individual claim is disruptive with that scheme.

TILA's statutory mandate of disclosure of material terms is intended to benefit all consumers and compliant creditors, not just the individual claimant. *Parker v. DeKalb Chrysler Plymouth*, 673 F.2d 1178, 1180 (11th Cir. 1982). The general statutory scheme envisions individual consumers acting as "private attorneys general." *Parker*, 673 F.2d at 1181. Congress intended to create a private attorney general class action right for the express purpose of "insur[ing] nationwide adherence to uniform disclosures" and providing a vehicle by which courts can "assess a meaningful penalty upon a creditor to induce compliance with" TILA's requirements. S. Rep. 93-278, 14-15.

This congressional purpose has been recognized by every court to have considered the history of the act. An early case stating the purpose of TILA was *Ratner v. Chemical Bank*, 329 F. Supp. 270 (S.D.N.Y. 1971) where the Court held that "The scheme of the statute, *as both sides agree* (emphasis added), is to create a species of 'private attorney general' to participate prominently in enforcement . . . Congress made clear its broader scheme, and

broader system of reimbursement, for private enforcement. It invited people like the present plaintiff, whether they were themselves deceived or not, to sue in the public interest. Following familiar precedents, it encouraged such actions by providing, in addition to the incentive of public service, costs and a reasonable attorney's fee above the minimum recovery of $100." *Id.*

In *James v. Home Construction Co.*, 689 F.2d 1357 (11th Cir. 1982), the Court agreed with *Ratner*, and stated that "One of the congressional goals underlying TILA was the creation of a system of private attorneys general who could effectively enforce the Act without government intervention. *Sosa v. Fite*, 498 F.2d 114, 121 (5th Cir. 1974); *Bizier v. Globe Fin. Services, Inc.*, 654 F.2d 1, 2 (1st Cir. 1981); *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740, 748 (5th Cir. 1973).

In *Thomas v. Myers-Dickson Furniture Co.*, 479 F.2d 740 (5th Cir. 1973) the Court stated that "Section 1640 is intended to allow aggrieved consumers to participate in policing the Act. The domain of consumer credit with its allied commercial practices is no longer in the laissez faire era of caveat emptor. That doctrine is increasingly relegated to its proper place as a historical relic without modern application. The regulatory scheme forcefully expounds an emerging ethic of 'caveat vendor,' and we will not strain to avoid giving effect to the Federal Consumer Credit Protection Act." *Id.; see also Broughton v. Cigna Healthplans of California*, supra at 18.

The stated purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms

available to him and avoid the uninformed use of credit." 15 U.S.C. § 1601(a). As this Court noted, TILA "reflects a transition in congressional policy from a philosophy of 'Let the buyer beware' to one of 'Let the seller disclose.' " *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 377 (1973). Since one of the major problems TILA sought to correct was the lack of uniformity in credit disclosure practices, it requires creditors to disclose all key information in a uniform manner.[3]

To effectuate its purposes, TILA and Regulation Z mandate the disclosure of, among other things, the finance charge, annual percentage rate ("APR"), and amount financed in every consumer credit transaction. 15 U.S.C. § 1638(a); 12 C.F.R. § 226.18. To promote uniformity, TILA and Regulation Z regulate the timing, form and placement of the mandated disclosures by requiring the disclosures to be "made before the credit is extended" and "grouped together" and "conspicuously segregated" from other information. 15 U.S.C. § 1638(b)(1); 12 C.F.R. § 226.17(a)(1). The "conspicuously segregated" requirement is normally satisfied by the use of a "federal box" – a heavy border surrounding the federal disclosures that separates them from other extraneous information.[4] The federal box allows the consumer to look to one place in the document so that he can easily compare the costs of credit. For information deemed extremely important (*i.e.* APR and finance charge), TILA requires that they be

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[3] S. Rep. No. 73, supra, at 17, *reprinted in* 1980 U.S.C.C.A.N. at 280.

[4] The use of the "federal box" is illustrated by the model forms accompanying Regulation Z. *See e.g.*, Appendix O.

disclosed "more conspicuously" than other required disclosures. 15 U.S.C. § 1632(a).

The legislative history of TILA indicates that "the enforcement of [TILA] would be accomplished largely through the institution of civil actions . . . " *Riggs v. Government Employees Financial Corp.*, 623 F.2d 68, 72 (9th Cir. 1980); *see also, Rodash v. AIB Mortgage Co.*, 16 F.3d 1142, 1144 (11th Cir. 1994); *Davis v. Werne*, 673 F.2d 866, 869 (5th Cir. 1982). However, Congress knew that actual damages for disclosure violations were likely to be nonexistent or difficult to ascertain.[5] *See Watkins v. Simmons and Clark, Inc.*, 618 F.2d 398, 400, n.6 (quoting S. Rep. No. 93-278, supra, at 14); *Postow v. OBA Federal S. & L. Ass'n.*, 627 F.2d 1370, 1384 (D.C. Cir. 1980). Therefore, § 1640(a) provides for the recovery of statutory damages as a basic enforcement and deterrent mechanism. *Riggs*, 623 F.2d at 71.

D. EFTA Includes Similar Statutory Language Encouraging Class Actions.

The Electronic Funds Transfer Act, 15 U.S.C. § 1693 et seq. ("EFTA") contains the same statutory cap on liability as TILA. *Compare* 15 U.S.C. § 1693m (1994) *with* 15 U.S.C. § 1640(a) (1994). As discussed previously, this statutory language balances Congress's desires for nationwide uniform compliance with desires for encouraging certification of class actions under TILA, and so Congress used the same language in EFTA to accomplish the same goals.

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[5] *See* S. Rep. No. 93-278, 93rd Cong., 1st Sess., 14 (1973).

This intent is confirmed by the Report of the Committee on Banking, Finance and Urban Affairs on the EFTA bill. The committee specifically recommended the inclusion of a provision regarding class actions to encourage them. The recommendation was not just for purposes of efficient disposition of potentially small claims, but because of the "symbolic" as well as practical effects on the industry. Including the provision sends a signal that Congress is "serious" about enforcement of this statute.

> "Yet the potential threat of class-action suits has been and remains important in persuading creditors and debt collectors to comply, who might otherwise be inclined to violate these laws with impunity. So, also would the threat of class-action suits in EFT persuade financial institutions and others subject to this legislation to comply with the spirit and letter of the law. Without a class action suit an institution could violate the title with respect to thousands of consumers without their knowledge, if its financial impact was small enough or hard to discover. Class-action suits for damages are an essential part of enforcement of the bill because, all too often, although many consumers have been harmed, the actual damages in contrast to the legal costs to individuals are not enough to encourage a consumer to sue. . . . many individual losses could quickly add up to thousands of dollars. The opposite could result, for without the class-action option courts might get besieged with law suits . . .
>
> "The potential of class actions is symbolically as well as practically important to consumers and to industry. Both groups will assess the seriousness of Congressional purpose on whether or

not class-action suits are provided for in this EFT legislation. Included, no one can doubt congressional intent that institutions provide EFT services only in a beneficial, responsible manner. Excluded, the opposite might assumed." Committee on Banking, Finance and Urban Affairs, H.R. 95-1315 (June 21, 1978).

CONCLUSION

For the reasons above, petitioner Terry Johnson respectfully requests that this Court grant his petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

DANIEL A. EDELMAN
Counsel of Record

CATHLEEN M. COMBS
JAMES O. LATTURNER
JOHN M. BRODERICK
EDELMAN, COMBS & LATTURNER
120 South LaSalle Street,
18th Floor
Chicago, IL 60603
(312) 739-4200
(312) 419-0379 (FAX)
Counsel for Petitioner

APPENDIX A

TERRY JOHNSON v. WEST SUBURBAN BANK; TELE-CASH INC.; COUNTY BANK OF REHOBOTH BEACH, DELAWARE; Tele-Cash Inc.; County Bank of Rehoboth Beach, Delaware,

Appellants

NO. 00-5047

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

225 F.3d 366; 2000 U.S. App. LEXIS 22151

July 17, 2000, Argued

August 29, 2000, Filed

PRIOR HISTORY:

On Appeal From the United States District Court For the District of Delaware. (D.C. Civ. No. 99-cv-00104). District Judge: Honorable Gregory M. Sleet.

DISPOSITION:

Order of the District Court denying the motion to stay proceedings and compel arbitration reversed and the case remanded for further proceedings consistent with this opinion.

COUNSEL:

WALTER WEIR, JR., ESQUIRE, SUSAN VERBONITZ, ESQUIRE (ARGUED), Weir and Partners, LLP, Philadelphia, PA. JAMES D. GRIFFIN, ESQUIRE, Griffin & Hackett, Georgetown, DE, Counsel for Appellants.

CATHLEEN M. COMBS, ESQUIRE (ARGUED), JOHN M. BRODERICK, ESQUIRE, Edelman, Combs & Latturner, Chicago, IL. WILLIAM L. O'DAY, JR., ESQUIRE, Law Office of William L. O'Day, Jr., Wilmington, DE, Counsel for Appellee.

CHRISTOPHER R. LIPSETT, ESQUIRE, ERIC J. MONGILNICKI, ESQUIRE, MICHAEL D. LEFFEL, ESQUIRE, Wilmer, Cutler & Pickering, Washington, DC, Counsel for Amici Curiae – The Delaware Retail Council; The New Jersey Retail Merchants Association; The Pennsylvania Retailers Association.

RICHARD P. ECKMAN, ESQUIRE, STEPHEN G. HARVEY, ESQUIRE, JEFFREY K. TECHENTIN, ESQUIRE, Pepper Hamilton, LLP, Philadelphia, PA, Counsel for Amici Curiae – American Bankers Association, American Financial Services Association, Consumer Bankers Association, and Delaware Bankers Association.

JUDGES:

Before: BECKER, Chief Judge, SLOVITER and NYGAARD, Circuit Judges.

OPINION:

OPINION OF THE COURT

BECKER, Chief Judge.

This appeal arises under the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 et seq., and the Electronic Fund Transfer Act ("EFTA"), 15 U.S.C. § 1693 et seq.

Plaintiff Terry Johnson, who entered into a short-term loan agreement with County Bank of Rehoboth Beach, Delaware ("Bank"), contends that the terms of the loan violated both the TILA and the EFTA. He seeks to bring a class action suit against both the Bank and Tele-Cash, Inc., which acted as the Bank's agent for the loan transaction. The Defendants respond that the dispute belongs in an arbitral forum, as the loan agreement signed by Johnson contains an arbitration clause. This appeal presents the question, one of first impression in the Courts of Appeals, whether claims under the TILA and the EFTA can be referred to arbitration under an arbitration clause when a plaintiff seeks to bring a claim on behalf of multiple claimants.

Johnson submits that compelling arbitration is precluded by an "irreconcilable conflict" between the arbitration clause and the purposes of the TILA and the EFTA. He argues that Congress consciously inserted language into the statutes with the intent of encouraging district court judges to certify class actions under Fed. R. Civ. P. 23. He further maintains that in the legislative history of amendments to the TILA, Congress communicated that class action remedies play a central role in the TILA and EFTA enforcement schemes. Rather than simply provide restitution, Johnson asserts, such litigation is meant to serve public policy goals through plaintiffs who act as private attorneys general, for the class action device is necessary to ensure meaningful deterrence to creditors who might violate the acts.

The District Court agreed with Johnson that there was an "inherent conflict" between compelling arbitration and the TILA and the EFTA and denied the

Defendants' motion to compel arbitration under the agreement. We will reverse. Though there may be some tension between the purposes of the debtor-protection statutes and arbitration, we are not persuaded that the two are so at odds as to preclude arbitration in this context. The Supreme Court has made clear that the presumption in favor of arbitration established by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 et seq., is a powerful one. Because neither the TILA nor the EFTA explicitly precludes the selection of arbitration instead of litigation, a party who agrees to arbitrate, but then asserts that his or her statutory claim cannot be vindicated in an arbitral forum, faces a heavy burden. That burden has not been met here.

As a predicate to this conclusion, we note our belief that the public interest purposes behind the civil penalty provisions of the statutes are not in conflict with arbitration, even if arbitration clauses may prevent the bringing of class actions. To the extent that class actions serve public interest goals, those goals are also met by other provisions of the laws, which allow for enforcement of the statutes by federal agencies that possess sufficient sanctioning power to provide a meaningful deterrent to creditors who violate the terms of either act. Moreover, neither act grants potential plaintiffs any substantive right that cannot be vindicated in an arbitral forum. While it may be true that the benefits of proceeding as a class are unavailable in arbitration, neither statute confers upon plaintiffs the right to proceed as a class. Instead, the right is merely a procedural one, arising under Fed. R.

Civ. P. 23, that may be waived by agreeing to an arbitration clause. In sum, because we can discern no congressional intent to preclude the enforcement of arbitration clauses in either statute's text, legislative history, or purpose, we hold that such clauses are effective even though they may render class actions to pursue statutory claims under the TILA or the EFTA unavailable.

I.

Johnson applied for and received a short-term loan for $ 250 from the Bank on July 10, 1998. The loan agreement disclosed an annual percentage rate of 917%, stemming from finance charges of $ 88 for the two-week loan. Thus, under the agreement, Johnson had to repay the loan by making one payment of $ 338 two weeks after receiving his $ 250. The loan agreement also contained the following arbitration clause:

> You and we agree that any claim, dispute, or controversy between us . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . . including the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration by and under the Code of Procedure of the National Arbitration Forum. . . . This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16.

App. 20. The loan agreement further provided:

> NOTICE: YOU AND WE WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH A COURT BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.
>
> By signing and sealing below, you agree to all of the terms of this Note, including the agreement to arbitrate disputes.

Id. at 20.

Johnson filed suit on behalf of a putative class in the District Court for the District of Delaware, alleging that the Bank and Tele-Cash, Inc., the bank's agent for the loan transaction, violated both the TILA and the EFTA by failing to properly disclose the high rate of interest, and by requiring loan applicants to open accounts from which they were required to irrevocably preauthorize electronic fund transfers to pay the loan.

The Defendants moved to stay the proceedings and compel arbitration. Concluding that arbitration was at odds with the purposes of the TILA and the EFTA, the District Court denied a motion to compel arbitration and stay the proceedings or dismiss the case. The District Court did, however, dismiss Johnson's claim that the arbitration clause was unconscionable. The Defendants timely appealed. The District Court had jurisdiction to hear Johnson's action under 28 U.S.C. § 1331. Though the District Court's refusal to compel arbitration was interlocutory, such refusals are immediately appealable under the FAA. *See* 9 U.S.C. § 16(a) ("An appeal may be taken from . . . an order . . . refusing a stay of any action under section 3 of this title [or] denying a petition under section 4 of this title to order arbitration to proceed."). The

question whether the TILA and the EFTA preclude arbitration when the plaintiff seeks to assert claims on behalf of a class presents a question of law over which our review is plenary.

II.

Whether a court can compel arbitration of TILA claims when the parties' loan agreement contains an arbitration clause but the plaintiff seeks to bring claims on behalf of multiple claimants is a question of first impression for this court. No other federal appellate court has squarely addressed the issue either. A number of district courts have ruled on the subject. Most of these rulings favor the view that the TILA does not preclude the predispute selection by the parties of an arbitral forum should any controversy arise. Compare *Thompson v. Illinois Title Loans, Inc.*, 2000 U.S. Dist. LEXIS 232, No. 99-C-3952, 2000 WL 45493 (N.D. Ill. Jan. 11, 2000); *Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627 (D. Del. 1999); *Stout v. Byrider*, 50 F. Supp. 2d 733 (N.D. Ohio 1999); *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410 (M.D. Ala. 1997), rev'd on other grounds, 178 F.3d 1149 (11th Cir. 1999), cert. granted, 120 S. Ct. 1552 (2000); *Lopez v. Plaza Fin. Co.*, 1996 U.S. Dist. LEXIS 5566, No. 95-C-7567, 1996 WL 210073 (N.D. Ill. April 25, 1996); *Meyers v. Univest Home Loan, Inc.*, 1993 U.S. Dist. LEXIS 11333, No. C-93-1783 MHP, 1993 WL 307747 (N.D. Cal. Aug. 4, 1993), with *Lozada v. Dale Baker Oldsmobile, Inc.*, 91 F. Supp. 2d 1087 (W.D. Mich. 2000).

In general, nothing prevents contracting parties from including a provision in their agreements that refers

statutory claims arising under the contract to arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). Arbitration of statutory claims will not be precluded absent congressional direction. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). The burden of establishing that Congress meant to preclude arbitration for a statutory claim rests with the party who seeks to avoid arbitration. *See Gilmer*, 500 U.S. at 26. Such intention may be found in the text, legislative history, or in an "inherent conflict" between arbitration and the statute's underlying purposes. *Id.* (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)). "Throughout such an inquiry, it should be kept in mind that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.' " *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)).

It is the third category, inherent conflict, on which the District Court based its opinion. The Court concluded that an inherent conflict existed because "without the possibility of class action liability looming on a creditor's horizon, there is a very real possibility that these entities will not voluntarily comply with the Truth-in-Lending regulations." *Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 271 (D. Del. 1999). We agree that if *Johnson* is to prevail, it

must be on the basis of demonstrating an inherent conflict. There is nothing in either the text or the legislative history of the TILA to indicate that Congress intended to allow plaintiffs to avoid binding arbitration clauses. Both the statute and the legislative history, however, offer insight into the question whether an "inherent conflict" is to be found between the statute and arbitration.

A. Statutory Language

The TILA provides for civil liability for lenders who fail to give the disclosures required by the statute. *See* 15 U.S.C. § 1640. An aggrieved party is entitled to recover actual as well as statutory damages. Statutory damages can be twice the amount of any finance charge, but, for most transactions, they may not exceed $ 1,000 or fall short of $ 100. *See id.* §§ 1640(a)(1), (2). The statute specifically addresses the damages available in a class action, limiting the maximum potential recovery. Plaintiffs can recover

> in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $ 500,000 or 1 per centum of the net worth of the creditor.

Id. § 1640(a)(1)(B). The statute further directs that

> in determining the amount of award in any class action, the court shall consider, among other

> relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional.

Id. § 1640(a).

Though the statute clearly contemplates class actions, there are no provisions within the law that create a right to bring them, or evince an intent by Congress that claims initiated as class actions be exempt from binding arbitration clauses. The "right" to proceed to a class action, insofar as the TILA is concerned, is a procedural one that arises from the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 23.

B. Legislative History

Johnson relies heavily on the legislative history behind several amendments to the TILA. After the law was first enacted, some courts were reluctant to certify class actions, in part due to the concern that large class awards could overwhelm lending institutions. *See* generally *Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972) (refusing to certify class of TILA plaintiffs when "the allowance of thousands of minimum recoveries like plaintiff's would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy Congress prescribed as the means of private enforcement"). In 1974 Congress responded by enacting the limitations on class action recovery discussed above. In so doing, it created some legislative history that bespeaks the potential role that class actions are meant to

play in the enforcement of the TILA's substantive requirements. Johnson contends that this history demonstrates Congress's intent to preserve a statutory class action remedy under the TILA.

Most of the language favorable to Johnson is found in a report of the Senate Committee on Banking, Housing and Urban Affairs pertaining to the 1974 amendments. We quote from it at length.

> A problem has arisen in applying these minimum liability provisions in class action suits involving millions of consumers. If each member of the class is entitled to a minimum award of $ 100, a creditor's liability can be enormous. For example, if a large national department store chain with 10 million customers fails to include a required item of information on its monthly billing statement, it can be subject to a minimum liability of $ 1 billion in a class action suit
>
> . . . . The purpose of the civil penalties section under Truth in Lending was to provide creditors with a meaningful incentive to comply with the law without relying upon an extensive new bureaucracy. However, the Committee feels this objective can be achieved without subjecting creditors to enormous penalties for violations which do not involve actual damages and may be of a technical nature. Putting a reasonable limit on a creditor's maximum class action liability would seem to be in the best interest of both creditors and consumers.
>
> . . . . The Committee believes the present ambiguities and uncertainties with respect to class action suits under Truth in Lending should be

> clarified. Moreover, the Committee agrees with the Federal Reserve Board that "potential class action liability is an important encouragement to the voluntary compliance which is so necessary to insure nationwide adherence to uniform disclosure" and that such remedies should not be restricted to actual damages. As the Committee pointed out in its report on similar legislation last year, "Most Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to insure compliance."
>
> Accordingly, the Committee again decided to place an aggregate limitation on a creditor's class action liability for violations not involving actual damages.

S. Rep. No. 93-278, at 14-15 (1973). The conference report for the final legislation is far less expansive, not discussing the purposes of the caps in any great detail, but stating that "the limitation on class action suits was further limited to the lesser of $ 100,000 or 1 percent of the net worth of the creditor to protect small business firms from catastrophic judgments." H.R. Conf. Rep. No. 93-1429 (1974), reprinted in 1974 U.S.C.C.A.N. 6148, 6153.

Several years later, the cap on class action awards was raised from $ 100,000 to $ 500,000. At the time, the Senate report, prepared by the Banking, Housing and Urban Affairs Committee, noted:

> The chief enforcement tool will continue to be private actions for actual damages and civil penalties. . . . The risk of any ceiling on class action recoveries is that, if it is too low, it acts as a positive disincentive to the bringing of such

> actions and thus frustrates the enforcement policy for which class actions are recognized. . . .
>
> The Committee wishes to avoid any implication that the ceiling on class action recovery is meant to discourage use of the class action device. The recommended $ 500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor.

S. Rep. No. 94-590, at 8 (1976), reprinted in 1976 U.S.C.C.A.N. 431, 438.

Though Congress did not address the role of arbitration in the legislative history, Johnson urges that the history recited above demonstrates the centrality of class actions to the TILA's effective enforcement.[1] Accordingly, we turn to consider whether an arbitration clause that precludes bringing a class action suit under the TILA irreconcilably conflicts with the statute.

C. Statutory Purposes

Because nothing in the legislative history or the statutory text of the TILA clearly expresses congressional intent to preclude the ability of parties to engage in

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[1] Insofar as the committee did endorse class actions, it should be noted that the endorsement was not unequivocal. The committee said it would be considering alternatives to class actions in the future, adding "we are hopeful that there may be workable and effective substitutes for the class action as a consumer enforcement device. . . . " *Id.*

arbitration, Johnson must demonstrate that arbitration irreconcilably conflicts with the purposes of the TILA. While Johnson may be correct in arguing that Congress contemplated class actions as a part of the TILA enforcement scheme, and even that class actions were self-consciously promoted by Congress in amending the statute, he falls short of demonstrating irreconcilable conflict between arbitration and the TILA.

1. TILA's public policy goals

Johnson focuses on the ability of a class action award to act as a penalty against lenders who violate the TILA. This focus is logical. The prospect of a class action award will doubtless deter TILA violations more effectively than the prospect that debtors will pursue individual actions, either in court or in arbitration, because the damages available to individuals are generally limited. *See* 15 U.S.C. § 1640. In this manner, argues Johnson, class actions are central to TILA's purposes, because the statute's civil damages provisions are not remedial, but rather, given the frequent absence of actual damages, are designed to deter unfair credit practices. Phrased another way, the TILA, in Johnson's submission, is meant to encourage private attorneys general, and the statute as a whole is intended for public purposes rather than private grievances. While these arguments carry force, they are ultimately unpersuasive, for they do not translate into a conclusion that class actions are necessary to provide deterrence or fulfill any of the other goals of the Act.

a. The effects of arbitration on private litigation

First, even if plaintiffs who sign valid arbitration agreements lack the procedural right to proceed as part of a class, they retain the full range of rights created by the TILA. These rights remain available in individual arbitration proceedings. The Supreme Court has made clear that when arbitration will preserve a plaintiff's substantive rights, compelling arbitration in accordance with an arbitration clause will not impede a statute's deterrent function. "So long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). Johnson does not argue that the arbitral forum selected in his agreement is somehow inadequate to vindicate any of his rights under the TILA or that arbitrators would be unable to afford him any relief that he could individually obtain in a court proceeding, including injunctive relief or attorney's fees. Cf. *Randolph v. Green Tree Fin. Corp.*, 178 F.3d 1149, 1158 (11th Cir. 1999), cert. granted, 120 S. Ct. 1552 (2000) (reversing order compelling arbitration in a TILA case because the clause at issue "raises serious concerns with respect to filing fees, arbitrators' costs and other arbitration expenses that may curtail or bar a plaintiff's access to the arbitral forum"); *Baron v. Best Buy Co., Inc.*, 75 F. Supp. 2d 1368, 1370 (S.D. Fla. 1999) (appeal pending) (refusing to compel arbitration in a TILA case when arbitration agreement required parties to bear own expense for attorneys' costs in contravention of TILA provisions that provide for recovery of attorneys' fees).

Under the prevailing jurisprudence, when the right made available by a statute is capable of vindication in the arbitral forum, the public policy goals of that statute do not justify refusing to arbitrate. The notion that there is a meaningful distinction between vindicating a statute's social purposes and adjudicating private grievances for purposes of determining whether a statute precludes compelling arbitration under a valid arbitration clause was rejected by the Supreme Court in *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). That case concerned whether claims under the Age Discrimination in Employment Act ("ADEA") must be available in a judicial forum. The Court concluded otherwise, despite arguments based on the ADEA's important social policy goals. "As *Gilmer* contends, the ADEA is designed not only to address individual grievances, but also to further important social policies. We do not perceive any inherent inconsistency between those policies, however, and enforcing agreements to arbitrate age discrimination claims." *Id.* at 27 (citation omitted). Class actions could be similarly effective in promoting the ADEA's social policies, and, as discussed below, that statute lends itself more easily to being construed as creating a substantive right to a class action. *Gilmer* therefore appears to foreclose much of Johnson's argument.

We also note that while arbitrating claims that might have been pursued as part of class actions potentially reduces the number of plaintiffs seeking to enforce the TILA against creditors, arbitration does not eliminate plaintiff incentives to assert rights under the Act. The sums available in recovery to individual plaintiffs are not

automatically increased by use of the class forum. Indeed, individual plaintiff recoveries available in a class action may be lower than those possible in individual suits because the recovery available under TILA's statutory cap on class recoveries is spread over the entire class. Nor will arbitration necessarily choke off the supply of lawyers willing to pursue claims on behalf of debtors. Attorneys' fees are recoverable under the TILA, *see* 15 U.S.C. § 1640(a)(3), and would therefore appear to be recoverable in arbitration, as arbitrators possess the power to fashion the same relief as courts.[2] In sum, though pursuing individual claims in arbitration may well be less attractive than pursuing a class action in the courts, we do not agree that compelling arbitration of the claim of a prospective class action plaintiff irreconcilably conflicts with TILA's goal of encouraging private actions to deter violations of the Act. Whatever the benefits of class actions, the FAA" requires piecemeal resolution when necessary to give effect to an arbitration agreement." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 20, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1985) (emphasis in the original).

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[2] There does not appear to be a problem with securing the full range of remedies available under the TILA in this case because Rule 20(d) of the National Arbitration Forum, the arbitrators selected in the parties' contract, currently authorizes arbitrators to "grant any remedy or relief allowed by applicable substantive law and based on a Claim, Response, or Request properly submitted by a Party under this Code." Of course if the arbitral rules in question precluded the substantive relief made available by the statute, or the forum otherwise presented barriers to a plaintiff's assertion of his or her rights, we would have a different case.

b. The availability of administrative enforcement mechanisms

Our conclusion that there is no irreconcilable conflict between the TILA's social policy goals and arbitration of claims that could have been heard as part of a class action is bolstered by the statute's administrative enforcement provisions. These provisions offer meaningful deterrents to violators of the TILA if private enforcement actions should fail to fulfill that role. The statute gives general enforcement power to the Federal Trade Commission as the "overall enforcing agency," and permits it to employ its powers under the Federal Trade Commission Act, *see* 15 U.S.C. § 1607(c), such as the issuing of cease and desist orders, *see* 15 U.S.C. § 45. The TILA also grants enforcement authority to the variety of federal agencies that have jurisdiction over various lending institutions, including the Office of the Comptroller of the Currency, the Federal Reserve Board, and the FDIC. *See* 15 U.S.C. § 1607(a). In addition to allowing these federal agencies to order the adjustment of inaccurately disclosed finance charges, *see id.* § 1607(e), the TILA cross references section 8 of the Federal Deposit Insurance Act, 12 U.S.C. § 1818, to set forth other enforcement powers, *see* 15 U.S.C. § 1607(a). Therefore the agencies may, for example, impose monetary penalties of up to $ 5,000 per day (or of $ 25,000 per day if the violations are part of a pattern of misconduct), *see* 12 U.S.C. § 1818(i), or in some instances order the suspension and removal of institution directors or officers, *see* 12 U.S.C. § 1818(e).

Johnson responds by invoking the portion of the legislative history that speaks to the need to avoid "relying upon an extensive new bureaucracy." S. Rep. No. 93-278, at 14 (1973). This reference is of limited usefulness, for this snippet of legislative history does not indicate congressional intent that arbitration be precluded, or that individual actions are inadequate to serve the function of deterring violations of the TILA. It may be true that Congress saw value in maintaining the availability of class actions, but that does not translate to the conclusion that it intended to preclude private parties from contracting around their availability. Under the framework established by the Supreme Court, legislative history may be used to demonstrate congressional intent to preclude arbitration. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). When that history is used, as here, merely to demonstrate that the judicial remedies provided for or contemplated by a statute are important, it is of noticeably reduced value. The importance of statutory judicial remedies are always evident from their mere existence – Congress obviously enacted them for a reason. Were they not the object of a congressional goal, they would not have been enacted. It is therefore hard to see how the legislative history relied upon by Johnson could possibly be dispositive.[3]

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[3] Moreover, even if legislative history were dispositive, there is similar history accompanying the original version of the TILA that indicates the importance of administrative enforcement in securing the rights of most consumers. The House Report, prepared by the Committee on Banking and Currency, explained that enforcement on the administrative level was essential to the legislative purpose of the Act. *See* H.R.

Insofar as Congress's intent, broadly contemplated, is concerned, we must give equal consideration to Congress's policy goals in enacting the FAA. The statute was intended to overcome judicial hostility to agreements to arbitrate, *see Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219-21 & n.6, 84 L. Ed. 2d 158, 105 S. Ct. 1238 (1985), and it reflects "a liberal federal policy favoring arbitration agreements," *see Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). *See* also H.R. Rep. No. 68-96, at 1 (1924) ("Arbitration agreements are purely matters of contract, and the effect of this bill is simply to make the contracting party live up to his agreement."). Indeed, a Senate Judiciary Committee Report supporting the legislation explained that arbitration provides benefits to both consumers and businesses in speed and lower costs. "The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expense increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals." S. Rep. No. 68-536, at 3 (1924).

Rep. No. 90-1040 (1968), reprinted in 1968 U.S.C.C.A.N. 1962, 1975. "For the relatively unsophisticated consumer, particularly those of modest means, administrative enforcement will provide their only protection against unscrupulous merchants or lenders." *Id.* The report also characterizes the civil remedies as secondary to the administrative ones. "While primary enforcement of the bill would be accomplished under the administrative enforcement section discussed above, further provision is made for the institution of civil action by an aggrieved debtor." *Id.* at 1976.

Similarly, the committee found that there was general satisfaction among participants with arbitration. *See id.* A 1982 House of Representatives report reached similar conclusions, stating that "the advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; [and] it is often more flexible in regard to scheduling. . . . " H.R. Rep. No. 97-542, at 13 (1982). These benefits have been similarly recognized by the Supreme Court as being part of Congress's intent in passing the FAA. *See Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 280, 130 L. Ed. 2d 753, 115 S. Ct. 834 (1995) (citing the 1924 Senate Report and the 1982 House Report). We therefore cannot consider the legislative history relied upon by Johnson without giving equal heed to the clear congressional policy behind the FAA.

In short, Johnson's reliance on the legislative history summarized in Part II.B is fundamentally flawed. He uses it not to show that Congress intended that parties could avoid a valid arbitration clauses [sic] if they wished to litigate a TILA claim, but rather, and in a more attenuated manner, to show that class actions have important purposes under the statute. But nothing in the cited passages demonstrates that parties cannot choose to waive judicial remedies in favor of arbitration. In any case, the loss of the availability of a class action does not mean the loss of meaningful deterrence to TILA violations, insofar as the public remedies discussed above remain. It may be true

that the unavailability of class actions removes an incentive for lenders to comply with the statute, but it is far from the only incentive to do so.

We similarly do not view the fact that Congress seems to have self-consciously encouraged class actions as particularly telling. In acting to ease the certification of classes, *see supra* Part II.B, Congress did nothing to preserve the right to a class action over arbitration or preclude opting for arbitration. Rather, it only altered the factors that judges consider in determining whether to allow the procedural right of a class action to be exercised. Notably, Congress did not add language compelling judges to recognize prospective classes under any circumstances. One can therefore look at the 1974 and 1976 amendments as efforts by Congress to place class actions on the same footing as any other lawsuit, no more or less subject to arbitration than a cause of action arising under any other statute.

2. Substantive Rights

Johnson also argues that the TILA does effectively create an unwaivable right to bring a class action. The strongest statement of this argument is as follows. Congress enacted a scheme in which the court hearing a class action could set a damage figure up to a certain amount for certain patterns of conduct. This judicial flexibility in imposing damages up to $ 500,000 only exists if a class action is allowed, as individual plaintiff claims are generally capped at $ 1,000. Therefore, a right of classes to a judicially crafted punitive remedy is lost if this court orders arbitration of Johnson's claims. Similarly, if class

actions are precluded, arbitrators acting in lieu of courts would not have a basis for considering, in connection with a class remedy, the frequency and persistence of compliance failures by the creditors, the number of persons adversely affected, or the creditors' intent. *See* 15 U.S.C. § 1640(a).[4]

This argument is unavailing in light of *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). The ADEA, at issue in *Gilmer*, presented far more powerful textual support than the TILA for concluding that there is a right to proceed collectively despite the existence of an arbitration clause. The ADEA actually provides for collective litigation. *See* 29 U.S.C. § 626(b) (referencing the remedies in 29 U.S.C. § 216). "An action . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (emphasis added). In short, the statute creates a right to sue collectively, which is not similarly created by the TILA. Yet the Supreme Court still ruled that the ADEA

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[4] This court has never addressed the question whether class actions can be pursued in arbitral forums, though it appears impossible to do so unless the arbitration agreement contemplates such a procedure. *See Champ v. Siegel Trading Co.*, 55 F.3d 269, 274-75 (7th Cir. 1995). At oral argument, the parties indicated that the rules of the National Arbitration Forum, which govern the arbitration agreement here, preclude the joinder of actions unless all parties affirmatively consent. We therefore assume, for purposes of this appeal, that Johnson's effort to pursue his claims as a representative of a class would be precluded by enforcement of the arbitration clause.

did not preclude arbitration notwithstanding the unavailability of the class action remedy there (and also notwithstanding all of the public interests vindicated by the statute as discussed above in Part II.C.1). *See Gilmer*, 500 U.S. at 32.

Johnson argues that *Gilmer* is taken out of context vis-a-vis the provision for class actions because the Supreme Court noted that the EEOC, in enforcing the ADEA, could still seek class-wide relief, while the FTC is not similarly capable. We do not believe that this argument carries any force. As discussed above, powerful punitive enforcement mechanisms remain available to administrative bodies under the Act even if these tools are not in the form of class actions.

Furthermore, simply because judicial remedies are a part of a law does not mean that Congress meant to preclude parties from bargaining around their availability. This is manifest in the Supreme Court's treatment of the availability of class actions in *Gilmer*. "But 'even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.' " *Gilmer*, 500 U.S. 20 at 32 (quoting *Nicholson v. CPC Int'l Inc.*, 877 F.2d 221, 241 (3d Cir. 1989) (Becker, J., dissenting)) (alteration in the original). The same holds true for the TILA. Even if we were to conclude that the statute implies a right to proceed as a member of a class, *Gilmer* indicates that rights of this nature are waivable so long as the rights the statute was designed to protect may be vindicated by other means. We do not think this unfair. Only those who

consent to credit agreements with binding arbitration clauses are forced to abandon this procedural avenue; those who do not consent to arbitration in their contracts have the full selection of forums.[5]

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[5] Of course even when arbitration clauses are included in agreements, they may be set aside if they are fraudulently induced or are in some way unconscionable. As noted above, Johnson did allege that his arbitration clause was unconscionable, but the District Court found no basis for the conclusion that the clause was in any way oppressive, in large part because the clause did not create an arbitration procedure that favors one party over another. *See Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 279 (D. Del. 1999). Though Johnson complains on appeal that the arbitration clause was a contract of adhesion, he does not make any argument to contradict the District Court's conclusion that the arbitration clause is not unconscionable.

Johnson also claims that waiver of judicial remedies through a contract of adhesion violates the Equal Credit Opportunity Act ("ECOA"), which prohibits discrimination against any credit applicant who exercised a right created under the chapter of the U.S. Code that includes the TILA. *See* 15 U.S.C. § 1691. But Johnson does not properly allege that there has been any discrimination, or that he exercised any right under any act. Johnson's purported authority for the proposition that the ECOA is applicable is *Owens v. Magee Fin. Serv.*, 476 F. Supp. 758 (E.D. La. 1979), and *Bryson v. Bank of New York*, 584 F. Supp. 1306 (S.D.N.Y. 1984). Both cases, however, presented strikingly different facts from those at issue here, as they involved oppressive conduct against individuals who actively sought to assert rights under the TILA. In *Owens*, a creditor defendant, already being sued for a TILA violation by the debtor, made additional credit contingent on the debtor's signing a settlement document of her active lawsuit. *See Owens*, 476 F. Supp. at 768. *Bryson* involved a denial of a loan application simply because an applicant inquired about the ability to obtain a loan without taking credit insurance. This was

In sum, Johnson's arguments that the TILA precludes arbitration are unpersuasive. "If Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). No such intent is deducible here.

III.

The District Court further held that compelling arbitration of claims arising under the EFTA irreconcilably conflicts with that statute as well. This ruling was based on the fact that the EFTA contains limitations on class action recovery that mirror those contained in the TILA. Compare 15 U.S.C. § 1640(a), with 15 U.S.C. § 1693m(a). The District Court inferred that Congress's use of identical language bespoke identical goals, and that Congress was seeking to encourage the certification of class actions under the EFTA as it had under the TILA. Because the Court had concluded that this goal created an inherent conflict with arbitration in the TILA context, it followed that the same conflict was manifest when EFTA claims

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a violation because TILA provides consumers with the right to refuse to purchase such insurance unless the premium is included in the statement of the finance charge of the loan. *See Bryson*, 584 F. Supp. at 1318.

These differences aside, Johnson plainly cannot claim that Defendants' conduct violated the ECOA or its implementing regulation because, as we discuss in the text, we hold today that the arbitration clause contained in the loan agreement did not serve to deprive Johnson of any rights held under the TILA.

were arbitrated. *See Johnson v. Tele-Cash, Inc.*, 82 F. Supp. 2d 264, 272 (D. Del. 1999). While we agree that resolution of the arbitration issue with respect to TILA claims would also apply to the EFTA, our disagreement with the District Court about whether the TILA precludes compelling arbitration commands a similarly contrary conclusion about the EFTA issue. The EFTA's class action language was drafted in 1978, after the identical language was placed in the TILA by the 1974 and 1976 amendments. *See* Electronic Fund Transfer Act, Pub. L. No. 95-630, § 915, 92 Stat. 3737 (1978) (codified at 15 U.S.C. § 1693m(a)). We do not believe that Congress would have different intended meanings for identical statutory language contained in similar statutes. Because there is no irreconcilable conflict between arbitration and the goals of the TILA, we similarly hold that claims arising under the EFTA may also be subject to arbitration notwithstanding the desire of a plaintiff who previously consented to arbitration to bring his or her claims as part of a class.

The order of the District Court denying the motion to stay proceedings and compel arbitration will be reversed and the case remanded for further proceedings consistent with this opinion.

APPENDIX B

TERRY JOHNSON, Plaintiff, v. TELE-CASH, INC., and COUNTY BANK OF REHOBOTH BEACH, DELAWARE, Defendants.

Civil Action No. 99-104-GMS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

82 F. Supp. 2d 264; 1999 U.S. Dist. LEXIS 20632

December 29, 1999, Decided

December 29, 1999, Filed

DISPOSITION:

Motion to Stay Proceedings and Compel Arbitration (D.I. 7) filed by Defendants Tele-Cash, Inc. and County Bank of Rehoboth Beach, Delaware DENIED; Motion to Dismiss (D.I. 7) filed by Defendants Tele-Cash, Inc. and County Bank of Rehoboth Beach, Delaware GRANTED IN PART and DENIED IN PART; Claim seeking a declaratory judgment that the arbitration clause contained within the loan agreement signed by Plaintiff Terry Johnson unconscionable DISMISSED.

COUNSEL:

William L. O'Day, Jr., Esquire, Law Offices of William L. O'Day, Jr., Wilmington, Delaware, for Plaintiff.

Daniel A. Edelman, Esquire, Kathleen M. Combs, Esquire, James O. Latturner, Esquire, Sheila A. O'Laughlin, Esquire, and Heather C. Sullivan, Esquire, Of counsel, EDELMAN & COMBS, Chicago, Illinois, for Plaintiff.

James D. Griffin, Esquire and David R. Hackett, Esquire, GRIFFIN & HACKETT, P.A., Georgetown, Delaware, for Defendants.

Walter Weir, Esquire, Of counsel, WEIR & PARTNERS, LLP, Philadelphia, Pennsylvania, for Defendants.

JUDGES:

Gregory M. Sleet, UNITED STATES DISTRICT JUDGE.

OPINION BY:

Gregory M. Sleet

OPINION:

December 29, 1999.

Wilmington, Delaware.

Gregory M. Sleet

District Judge.

I. INTRODUCTION.

On February 25, 1999, Terry Johnson filed a class action lawsuit with this court. In it, he alleges that Tele-Cash, Inc. and the County Bank of Rehoboth Beach, Delaware (the "defendants")[1] have violated both the Truth In Lending Act ("TILA"), *15 U.S.C. § 1601 et seq.* (1994), and the Electronic Funds Transfer Act ("EFTA"), *15 U.S.C. § 1693 et seq* (1994), by failing to properly disclose the excessively high rates of interest which they charge for

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[1] On May 20, 1999, the parties agreed to voluntarily dismiss the claims against a third defendant – West Suburban Bank.

their short-term loans and by requiring borrowers to consent to a complicated electronic fund transfer scheme in order to obtain these loans.[2]

On May 5, 1999, the defendants moved to stay these proceedings pending the outcome of arbitration.[3] In their motion, the defendants point out that Johnson's loan application contains an arbitration clause which prohibits him from filing suit and, instead, requires him to vindicate any claim that he may have against the defendants through binding arbitration. In opposition to the motion, Johnson claims that the arbitration clause is unenforceable as unconscionable since it would effectively eviscerate the purpose of the TILA by eliminating the possibility of class relief.

The court agrees. The intended purpose of the TILA was "to encourage class actions in the truth-in-lending

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[2] On this point, Johnson alleges that, in order to obtain a loan, applicants must first open a checking account into which their wages are directly deposited. However, according to Johnson, the defendants immediately transfer these deposits out of these checking accounts into another account without providing the required notice to the borrowers. Johnson claims that, in order to obtain a loan, he had to irrevocably agree to this system of electronic transfers. Otherwise, the defendants would not extend him a line of credit. Put differently, he claims that terms were part of the loan agreement which the defendants drafted unilaterally.

[3] In the alternative, the defendants moved to dismiss Johnson's complaint on the grounds that the terms of the loan were adequately disclosed and, thus, no violation of the TILA occurred. In addition, the defendants contend that, given the factual allegations of the complaint, all of Johnson's remaining claims fail as a matter of law.

context because of the apparent inadequacy of the Federal Trade Commission's enforcement resources and because of a continuing problem of minimum compliance with the Act on the part of creditors." *See Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 400 (9th Cir. 1980) (citing Sen. Rept. No. 93-278, at 14-15 (1973)). As a result, a ruling which compels arbitration seems contrary to the underlying purpose of the TILA. The court reaches the same conclusion with respect to Johnson's EFTA claims. For these reasons, the court will deny the defendants' motion to compel arbitration. It will also deny the defendants' motion to dismiss as it relates to Johnson's claims under the TILA, the EFTA, and for a declaratory judgment that the rate of interest charged by the defendants was unconscionable. The following sections explain the court's reasoning more thoroughly.

II. BACKGROUND

On July 10, 1998, Johnson applied for and received a short-term loan in the amount of $250 from the County Bank of Rehoboth Beach. The one-page loan agreement set forth an annual percentage rate of 917 percent and a finance charge of $88. As a result, Johnson was required to repay his $250 loan by making one payment of $338 on July 24, 1998 – two weeks after he submitted his loan application and received the $250.

These terms were disclosed in a table located at the top of the loan agreement which looks something like this:

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	% 917.71	**Payment Schedule** You must make one payment of $ 338 on 7/24/98
FINANCE CHARGE The dollar amount the credit will cost you	$ 88	**Security Interest** The Loan is unsecured
AMOUNT FINANCED The amount of credit provided to you on your behalf	$ 250.00	**Late Charges** You must pay a late charge of 5% of the late payment if your Loan is not paid within 10 day of the due date
TOTAL OF PAYMENTS The amount you will have paid after you have made all payments as scheduled	$ 338	**Prepayment** If you pay your Loan in advance, you will not be entitled to a refund of part of the finance charge

See below for addition information about nonpayment, default, any required payment in full before the scheduled date, and prepayment refunds and penalties

While this table is not an exact representation of the information since the margins of the original are slightly different, it is in all other respects a fairly accurate portrayal of the information available to Johnson at the time that he entered into the loan agreement.

In addition, at the bottom, right above the signature line, the loan agreement provided a "boiler plate" arbitration clause which, in relevant part, reads:

> ARBITRATION: You and we agree that *any* claim, dispute, or controversy between us . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . . , *including* the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation *shall* be resolved by binding arbitration. . . . This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, *9 U.S.C. [§§] 1*-16. Judgment upon the award may be entered by any party in any court having jurisdiction.

(emphasis added).

Below this paragraph, the loan agreement provides two others which state:

> NOTICE: YOU AND WE WOULD HAVE HAD a RIGHT OR OPPORTUNITY TO LITIGATE DISPUTES THROUGH a COURT BUT HAVE AGREED INSTEAD TO RESOLVE DISPUTES THROUGH BINDING ARBITRATION.
>
> By signing and sealing below, you agree to all of the terms of this Note, including the agreement to arbitrate disputes.

With these facts in mind, this memorandum turns to a discussion of the relevant law.

III. DISCUSSION.

Given the clear and explicit language of the loan agreement, compelling arbitration seems to be a logical ruling, especially in light of the "congressional declaration of a liberal federal policy favoring arbitration agreements." *See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). However, this ruling would contravene the express congressional intent to "encourage the use of class actions as an important tool for enforcing Truth in Lending." *See Bantolina v. Aloha Motors, Inc.*, 419 F. Supp. 1116, 1120 (D. Haw. 1976). For this reason the court will deny the defendants' motion.

A. The Origin And Evolution Of The FAA.

Originally enacted in 1925, the FAA was adopted in an attempt to place arbitration agreements on the same level as other contracts and, thus, reverse the "longstanding judicial hostility" to these agreements that American courts had inherited from their English ancestors. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991); *see also Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 178 (3d Cir. 1999) (citing *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-26, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)). In light of the purpose of the FAA, it should come as no surprise to

learn that federal law presumptively favors the enforcement of arbitration agreements. *See In re Prudential Inc. Co. of Am. Sales Practice Litig.*, 133 F.3d 225, 231 (3d Cir. 1998) (cited in *Harris*). For this reason, the FAA authorizes a district court to compel the arbitration of any issue covered by a valid and enforceable arbitration agreement when a party to that agreement commences a legal action without first attempting to arbitrate the dispute. *See* 9 U.S.C. §§ 3 – 4 (1994); *see also Southland Corp. v. Keating*, 465 U.S. 1, 11-12, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984) (also cited in *Harris*).

Here, Johnson does not (and probably cannot) argue that his dispute falls outside the scope of the arbitration agreement. In fact, given the breadth of the contractual provision,[4] it is impossible to see how Johnson could claim otherwise. As a result, he effectively concedes the point. Thus, the court is left with only one question – namely, is the arbitration clause enforceable?

B. The Enforceability Of The Arbitration Clause With Respect To Johnson's TILA Claims.

On this point, Johnson contends that the arbitration clause is not enforceable because (1) Congress expressly intended to preclude the arbitration of claims arising

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[4] As mentioned earlier, the arbitration clause states, in relevant part, that "any claim, dispute, or controversy between [Johnson and the defendants] . . . and any claim arising from or relating to this Note, no matter by whom or against whom . . . , including the validity of this Note and of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration. . . . "

under the TILA by explicitly allowing for the possibility of class relief under the statute and (2) the arbitration agreement itself is unconscionable. Because the court agrees with Johnson's first argument, it need not address the second.

Citing to 15 U.S.C. § 1640 (1994), Johnson argues that Congress expressed a clear intent to guarantee class relief under the TILA by allowing individuals to bring a class action under the statute. Since an arbitrator cannot award this type of class-wide relief, Johnson contends that this court cannot compel the arbitration of this matter.

The most convincing rejection of this argument was expressed in *Lopez v. Plaza Fin. Co.*, 1996 U.S. Dist. LEXIS 5566, No. 95-C-7567, 1996 WL 210073, at *2-3 (N.D. Ill. Apr. 26, 1996). There, the district court stated that:

> It is true that compelling arbitration . . . will eliminate [the] plaintiff's ability to arbitrate his claims on behalf of a class. Nonetheless, this result is required because Congress has not created a statutory right to bring class actions under [the] TILA. . . . Section 1640, cited by [the] plaintiff in support of the proposition that a statutory right exists, does not establish a right *per se*; it only sets forth a limit on liability under class actions. . . . Where an enforceable arbitration clause allows only for individual arbitration, a class will not be certified. Therefore, [the] plaintiff's inability to bring class claims under [the] TILA is of no legal consequence.

Id. at *3 (citing *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276-77 (7th Cir. 1995); *see also Sagal v. First USA Bank, N.A.*, 69 F. Supp. 2d 627, 1999 WL 803851, at *4 (D. Del. Aug. 30, 1999) (citing *Lopez*).

In addition to concluding that the plaintiff had no statutory right to maintain a class action under the TILA, the *Lopez* court also found that Congress never intended to preclude the arbitration of TILA claims because the "plaintiff had provided no compelling legal authority to support this proposition. . . . " *Id.* As the *Lopez* court stated, "without such authority, [the] plaintiff's argument must fail." *Id.* While it is not clear what authority (if any) the *Lopez* plaintiff cited, the legislative history of Section 1640 suggests that Congress was trying to encourage the use of class actions as a means for enforcing the TILA. As a result, the court believes that a strong argument can be made that TILA claims should not be arbitrated since this forum cannot provide the class-wide relief available in the courts.

In 1974, Congress amended Section 1640 to provide a cap on liability for class actions brought under the TILA. *See Watkins v. Simmons & Clark,* 618 F.2d 398, 400 (9th Cir. 1980); *Bantolina v. Aloha Motors, Inc.,* 419 F. Supp. 1116, 1119-20 & n. 10 (D. Haw. 1976). Prior to the amendment, upon a showing of injury, each individual plaintiff was entitled to a minimum award of $100 under the statute. *See* 15 U.S.C. § 1640 (1970). However, in class action lawsuits which involved millions or tens of millions of consumers, granting this minimum amount of recovery to each individual plaintiff would result in an astronomical damage figure. For this very reason, numerous federal courts refused to certify class actions under the TILA since the "allowance of thousands of minimum recoveries . . . would carry to an absurd and stultifying extreme the specific and essentially inconsistent remedy

Congress prescribed as the means of private enforcement." *See Ratner v. Chemical Bank of New York Trust Co.*, 54 F.R.D. 412, 414 (S.D.N.Y. 1972). In response to these decisions, Congress amended the statute to provide a limit on the maximum recovery available under the TILA. This amendment was intended to encourage the federal courts to begin certifying class actions in Truth in Lending lawsuits. *See Watkins*, 618 F.2d at 400 n.6 (citing Sen. Rept. No. 93-278, at 14-15 (1973)); *see also Bantolina*, 419 F. Supp. 1116, 1119-20 & n. 11 (citing same).

In capping the maximum amount of recovery in class action lawsuits under the TILA at "the lesser of $500,000 or 1 per centum of the net worth of the creditor," 15 U.S.C. § 1640 (1994). Congress expressly stated that it "wished to avoid any implication that the ceiling on class action recovery was meant to discourage use of the class action device." *See Watkins*, 618 F.2d at 401 & n.7 (citing Sen. Rept. No. 94-590, *reprinted in* 1976 U.S. Code Cong. & Admin. News, at 431, 438). Instead, this amount was "meant to limit the exposure of creditors to vast judgments whose size would depend on the number of members who happened to fall within the class" while, at the same time, "providing . . . a workable Structure for private enforcement." *See id.* (citing same). As the Congress noted, "small businesses were protected by the 1 [percent] measure, while a potential half-million dollar recovery ought to act as a significant deterrent to even the largest creditor." *See id.* (citing same).

In adopting these amendments, Congress explained that "the purpose of the civil penalties under [the] Truth in Lending [Act] was to provide creditors with a meaningful incentive to comply with the law without relying

on an extensive new bureaucracy." Sen. Rept. No. 93-278, at 14. However, because "this objective could be achieved without subjecting creditors to enormous penalties for violations which did not involve actual damages and may be technical in nature," the Congress decided to "put[ ] a reasonable limit on a creditor's maximum class action liability" since it "seemed to be in the best interests of both creditors and consumers." *Id.* In so doing, Congress concurred with an earlier conclusion by the Federal Reserve Board that "potential class action liability was an important encouragement to the voluntary compliance which was so necessary to ensure nation-wide adherence to uniform disclosure" since "most Truth in Lending violations do not involve actual damages and . . . some meaningful penalty provisions are therefore needed to ensure compliance." *Id.* at 15 (citations omitted).

In light of this language, one district court has concluded that:

> The possibility of class-action exposure is *essential* to the prophylactic intent of the Act and is necessary to elevate truth-in-lending lawsuits "from the ineffective 'nuisance' category to the type of suit which has enough sting to insure that management will strive with diligence to achieve compliance."

See Bantolina, 419 F. Supp. at 1120 (quoting sen. Rep. No. 93-278, at 36-37) (emphasis added).

In *Watkins*, the Ninth Circuit reached the same conclusion, stating that the "legislative history surrounding these amendments [to the TILA] convinces us that Congress did intend, by them, to encourage class actions and

to use the threat of class action recoveries to force compliance with the Act." 618 F.2d at 402.

Here, if the court compelled arbitration, Johnson would be prevented from seeking and, therefore, obtaining this type of relief. As a result, the federal statute would be effectively stripped of its "sting" and reduced to nothing more than its mere "nuisance" value. *Cf. Bantolina,* 419 F. Supp. at 1120. Consequently, there would be no way to "provide creditors with a meaningful incentive to comply with the law" since they would no longer be facing the "meaningful penalty provisions [which were] needed to ensure compliance." *See* Sen. Rept. No. 93-278, at 14, 15. In other words, without a guarantee that Johnson may "effectively . . . vindicate his statutory cause of action in the arbitral forum," it is questionable that the "statute will continue to serve both its remedial and deterrent function." *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985). In light of this "inherent conflict" between compelling arbitration and the underlying purposes of the TILA, the court will deny the defendants' motion. *See id.*

In *Mitsubishi,* the Supreme Court did state that "We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history." 473 U.S. at 628. As the Supreme Court has later clarified, this intent is also "deducible from . . . an inherent conflict between arbitration and the statute's underlying purposes." *See McMahon,* 482 U.S. at 227 (citing *Mitsubishi,* 473 U.S. at 632-37).

1. The *Mitsubishi* decision.

The central issue in *Mitsubishi* revolved around whether the plaintiff would be able to recover treble damages for the defendant's anti-competitive behavior under the Sherman Act. *Id.* at 635-36. According to the plaintiff, if the dispute proceeded to arbitration, there was a risk that the arbitrator might apply Swiss law and, as a result, deny the plaintiff the opportunity to recover treble damages for activities which clearly occurred in the United States. *Id.*

In compelling arbitration, the Supreme Court noted that both of the parties agreed that U.S. law applied to the dispute. *Id.* at 636-37 & n.19. As a result, the Court was not concerned that the arbitration clause might be interpreted as a waiver of the plaintiff's statutory right to recover treble damages. *Id.* In fact, as the Supreme Court made clear when it compelled arbitration, if the "choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of [the plaintiff's] right to pursue statutory remedies for anti-trust violations, we would have little hesitation in condemning the agreement as against public policy." *Id.* at 637 n.19. Thus, because the plaintiff could "effectively . . . vindicate its statutory cause of action in the arbitral forum," the Court was willing to compel arbitration since there was no question that the Sherman Act "would continue to serve both its remedial and deterrent function." *Id.* at 637.

2. The *Mitsubishi* decision as it applies to Johnson's case.

Admittedly, the TILA does not confer a statutory right to "the lesser of $500,000 or 1 per centum of the net worth of the creditor." 15 U.S.C. § 1640. Instead, the Act only states that, "in the case of a class action," the plaintiff may recover this amount. *Id.* In this respect, the *Lopez* court was entirely correct. "Congress has not created a statutory right to bring class actions under [the] TILA." 1996 WL 210073 at *3. However, Congress did adopt this cap in an attempt to "encourage class actions and to use the *threat* of class action recoveries to force compliance with the Act." *See Watkins,* 618 F.2d at 402 (emphasis added); *see also Bantolina,* 419 F. Supp. at 1120 (recognizing the class action device as "an important tool [for] enforcing Truth in Lending"). Thus, without the possibility of class action liability looming on a creditor's horizon, there is a very real possibility that these entities will not voluntarily comply with the Truth-in-Lending regulations.

For example, under Section 1640, Johnson as an individual can only recover a maximum of $1,000 from the defendants. 15 U.S.C. § 1640(a)(1)(2)(a). However, as a representative of a class, he could obtain as much as 500 times that amount. *See id.* at § 1640(a)(1)(2)(B) (capping the maximum allowable recovery at $500,000). Obviously, the latter penalty ensures greater compliance with the TILA. However, by enforcing the boiler plate arbitration clause which is contained in this (and every other) one-page loan agreement unilaterally drafted by the defendants, the court would be allowing them to effectively insulate themselves against the very statutory penalties

which Congress deemed necessary to "provide creditors with a meaningful incentive to comply with the law." *See* Sen. Rept. No. 93-278, at 14. For this reason, this court doubts whether the TILA could "continue to serve *both* its remedial and deterrent function[s]" if the arbitration clause was enforced. *See Mitsubishi*, 473 U.S. at 637 (emphasis added). Thus, after considering the facts of this case in light of the teachings of the *Mitsubishi* decision, this court finds that there is "inherent conflict" between compelling arbitration and the underlying purposes of the TILA. The court will, therefore, deny the defendants' motion to compel the arbitration of Johnson's TILA claims.[5]

Delaware law allows a court to rescind a contract on the grounds of unconscionability. *See* Del. Code Ann. tit. 6, § 2-302 (1998). However, the Delaware Supreme Court has held that "mere disparity between the bargaining power of parties to a contract will not support a finding of unconscionability." *See Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 912 (Del. 1989). Instead, in order for a court to find unconscionability, "the party with the superior bargaining power [must have] used it to take advantage of his weaker counterpart" by drafting terms that are "so one-sided as to be oppressive." *Id.* (citing *Tulowitzki v. Atlantic Richfield Co.*, 396 A.2d 956, 960 (Del. 1978)).

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[5] Because the court has resolved the defendants' motion on these grounds, it need not reach Johnson's argument that the arbitration clause is itself unconscionable. However, because Johnson has also asked for a declaration that the clause in unconscionable, the court feels obligated to briefly address this argument.

In *Graham*, the Delaware Supreme Court compelled arbitration in the face of a clause which was virtually identical to the one contained in Johnson's loan agreement. The clause at issue in *Grahum* obligated the parties to enter into binding arbitration and, like the one here, was offered on a "take-it or leave-it" basis. 565 A.2d at 912-13. However, because the clause did not create & procedure which favored one party over another, the *Graham* court found it to be fair. *Id.* at 913. Thus, while inarguably a contract of adhesion, there can be little doubt that, under Delaware law, the arbitration clause which was contained within Johnson's loan agreement was not so unfair as to be unconscionable.

C. The Enforceability Of The Arbitration Clause With Respect To Johnson's Claims Under The EFTA.

Unfortunately, the parties only address Johnson's EFTA claims in passing. As a result, the court is left with little guidance on whether it should compel the arbitration of these claims.

In their opening brief, the defendants issue a blanket statement that "nothing contained in the TILA or EFTA expresses a congressional intent to preclude arbitration as a forum for litigating consumer claims brought under those statutes."

However, after reviewing the text of the EFTA, the court notes that the statute contains a provision entitled "civil liability" which sets forth a cap on class action damages that is virtually identical to the one provided under the TILA. *Compare* 15 U.S.C. § 1693m (1994) ("In the case of a class action, . . . the total recovery under this

subparagraph in any class action or series of class actions arising out of the same failure to comply to the same person shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the defendant.") *with* 15 U.S.C. § 1640(a) (1994) "In the case of a class action, . . . the total recovery under this subparagraph in any class action or series of class actions rising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor."). Thus, even though there is no legislative history which explains why Congress adopted the same ceiling on class action liability under the EFTA, the court presumes that Congress was trying to encourage courts to certify class action under this statute as well. Given this "inherent conflict" between compelling arbitration and the underlying purpose of the EFTA, the court will deny the defendants' motion to compel arbitration as it relates to Johnson's EFTA claims. *Cf. Mitsubishi*, 473 U.S. at 637.

D. The Enforceability Of The Arbitration Clause With Respect To Johnson's Claims For A Declaratory Judgment.

In their submissions, the parties failed to address whether Johnson's requests for a declaratory judgment should be heard by an arbitrator instead of this court. However, requiring the parties to arbitrate a minor portion of their dispute while they are simultaneously litigating the major issues before a court of law would be highly inefficient. For this reason, the court will not compel the arbitration of Johnson's claims seeking a declaratory judgment.

E. The Court Will Deny The Defendants' Motion To Dismiss In Part.

In their motion to dismiss, the defendants essentially advance two arguments. First, they contend that Johnson's TILA claims fail as a matter of law since (1) any arguable violation they committed is, at best, a mere technicality and (2) in any event, Johnson has failed to allege that he has suffered any actual injuries as a result of this alleged violation. Second, the defendants argue that Johnson's claims under the EFTA are like wise inadequately plead and, consequently, also fail as a matter of law.

The court disagrees. Because the law prohibits even "technical" violations of the TILA and because Johnson's allegations are sufficiently pled to state a cause of action under both the TILA and EFTA, the court will deny the defendants, motion to dismiss as it relates to these claims. Nevertheless, the court will grant the motion to dismiss with respect to Johnson's request for a declaratory judgment that the arbitration clause is unconscionable since the terms of this agreement were not so one-sided as to be oppressive.

1. Johnson's TILA claims.

Under 15 U.S.C. § 1632,

> The terms "annual percentage rate" and "finance charge" shall be disclosed *more conspicuously* than other terms, data, or information provided in connection with a transaction, except information relating to the identify of the creditor.

15 U.S.C. § 1632(a) (1994) (emphasis added); *see also* 12 C.F.R. 226.17(a)(2) (1998) (Regulation Z).

Here, the one-page loan agreement signed by Johnson contained the followed table which set forth, *inter alia*, the annual percentage rate of the loan and the finance charge.

ANNUAL PERCENTAGE RATE The cost of your credit as a yearly rate	% 917.71	**Payment Schedule** You must make one payment of $ 338 on 7/24/98
FINANCE CHARGE The dollar amount the credit will cost you	$ 88	**Security Interest** The Loan is unsecured
AMOUNT FINANCED The amount of credit provided to you on your behalf	$ 250.00	**Late Charges** You must pay a late charge of 5% of the late payment if your Loan is not paid within 10 day of the due date
TOTAL OF PAYMENTS The amount you will have paid after you have made all payments as scheduled	$ 338	**Prepayment** If you pay your Loan in advance, you will not be entitled to a refund of part of the finance charge

See below for addition information about nonpayment, default, any required payment in full before the scheduled date, and prepayment refunds and penalties

Thus, while it seems safe to say that the table "conspicuously disclosed" both the annual percentage rate and finance, it also seems fair to say that this information was not disclosed "more conspicuously" than the surrounding information, *see* 15 U.S.C. § 1632(a), since the "annual percentage rate" and the "finance charge" appear in the same-sized font with the same emphasis as the loans terms concerning the "amount financed" and the "total of payments."

As another district court stated in a strikingly similar context,

> While the terms "annual percentage rate" and "finance charge" are the most conspicuous terms on the page, [the terms] "amount financed" and "total of payments" are also prominently displayed. As a result, the four terms are *identically* presented and the defendants have failed to disclose the "annual percentage rate" and "finance charge" *more conspicuously* than the other terms . . . While this court acknowledges that this amounts to a technical violation, . . . the plaintiffs' claims survives the motion to dismiss because [the] TILA requires *strict compliance* with its terms.

See Brown v. C.I.L., Inc., 1996 U.S. Dist. LEXIS 4053, No. 94-C-1479, 1996 WL 164294, at *7 (N.D. Ill. Apr. 1, 1996) (emphasis added). In fact, the disclosure statement in *Brown* was virtually identical to the one at issue in this litigation. As the district court described,

> The top third of this box is subdivided into a horizontal row of four one-inch boxes. The first two boxes (reading from left to right) contain the terms "Annual Percentage Rate" and

> "Finance Charge" in bold capital letters, along with the appropriate values. The second two boxes contain the terms "Amount Financed" and "Total of Payments," also in bold capital letters.

Id. (citing U.S. Mag. Rept. & Rec., at 36).

In response, the defendants contend that, in 1980, Congress amended the TILA to "eliminate lawsuits, like [this one], based on hyper-technical violations of the TILA." Quoting *In re Russell*, the defendants claim,

> In 1980, Congress . . . softened the bite of the TILA somewhat by enacting the Truth-In-Lending Simplification and Reform Act. . . . At that point, Congress became convinced that one of the consequences of the TILA was a large volume of lawsuits based upon hyper-technicalities which no longer worked in the best interests of our society."

72 B.R. 855, 862 (Bankr. E.D. Pa. 1987) (citing Pub. L. No. 92-221, Title VI (1980)); *see also Laws v. PayDay Loan Corp. of Illinois*, 1999 U.S. Dist. LEXIS 16225, No. 98-C-5562, 1999 WL 966964, at *2-3 (N.D. Ill. Oct. 1, 1999).

The court is not persuaded by this argument.

a. The legislative history does not support this argument.

In 1980, Congress did amend the TILA but just not in the manner that the defendants claim. As Congress explained in adopting the amendments to the TILA, it hoped to "provide the consumer with clearer credit information" and to "make creditor compliance easier." *See*

Sen. Rept. No. 96-73, at 2 (*reprinted in* 1980 U.S. Code Cong. & Admin. News, at 280). Under the prior law, the creditor only needed to disclose information "clearly and conspicuously" and in a "meaningful sequence." *See Lamar v. American Fin. Sys. of Fulton County, Inc.*, 577 F.2d 953, 954 (5th Cir. 1978) (citing 15 U.S.C. § 1631(a) (1974); 12 C.F.R. § 226.6(a) (1974)). Given this fairly ambiguous language, disclosures were often "lengthy and difficult to understand." *See* Sen. Rept. No. 96-73, at 2. In fact, as Congress observed when it amended the TILA,

> The typical disclosure statement . . . is not an effective communication device. Most disclosure statement are lengthy, written in legalistic fine print, and have essential truth in lending disclosures scattered among various contractual terms. The result in a piece of paper which appears to be "just another legal document Instead of the simple, concise disclosure form Congress intended.

Id. at 3.

Not surprisingly, consumers were often confused about the terms of these agreements, and creditors, who had "sincerely tried to comply with the Act," often "found themselves in violation and subject to litigation" because they were unable to "keep[ ] current with [the] steady stream of administrative interpretations and amendments, as well as highly technical judicial decisions," concerning the Act. *Id.* at 2. For this reason, Congress sought to "simplify the typical truth in lending statement" by amending the TILA's disclosure requirements.

For starters, Congress replaced the "clearly and conspicuously" standard with the following requirement:

> The terms "annual percentage rate" and "finance charge" shall be disclosed more conspicuously than terms, date, or information provided in connection with a transaction, except information relating, to the identity of the creditor.

See The Truth In Lending Simplification and Reform Act, Pub. L. No. 96-221, § 122(a), 94 Stat. 168, 175 (1980) (codified as amended at 15 U.S.C. § 1631(a) (1994)). Given this change, it is highly doubtful that Congress would consider the failure to follow the explicit requirements of the new law as a "technical violation." *Cf. Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1379-80 (11th Cir. 1984) ("The applicable standard is strict compliance with the technical requirements of the Act. . . . Where the terms 'annual percentage rate' and 'finance charge' are not printed more conspicuously than other terminology in the . . . disclosure statement, the violation is a serious one which entities the plaintiffs to recovery.") (citing *Dixey v. Idaho First Nat'l Bank*, 677 F.2d 749, 751 (9th Cir. 1982)).

Moreover, to provide creditors with some guidance on how to comply with the new regulations, Congress included a "simplified statement prepared by the Federal Reserve Board" which "illustrated what a disclosure statement prepared in accordance with this bill's provisions would resemble." *Id.* at 3, 4. The first portion of this statement looked something like this:

ANNUAL PERCENTAGE RATE (the cost of your credit expressed as a yearly rate) . . . . . _____ %
FINANCE CHARGE (the dollar amount the credit will cost you) . . . . . $ _____ It does not include a $ _____ fee for filing a security interest.
AMOUNT FINANCED (the amount of credit you will receive) . . . . . $ _____
TOTAL OF PAYMENTS (the amount you will pay when you make all the payments) . . . . . $ _____ The total of payments will be paid in _____ monthly installments of $_____ which are due on the _____ day of each month. The first payment is due on _____ and the last payment on _____.
TOTAL SALE PRICE (the total cost to purchase your credit, including a down payment of $ _____) $ _____

As this illustration makes clear, the sample form which Congress provided as an example to creditors disclosed "more conspicuously" the "annual percentage rate" and "finance charge" for the loan. Consequently, the defendants' argument that Congress amended the TILA to "eliminate lawsuits, like [this one], based on hyper-technical violations of the TILA" misses the mark since, in 1980, Congress amended the TILA to discourage creditors from providing the very type of disclosures which are contained in the one-page loan agreement at issue in this case. While this decision may seem "hyper-technical," as the Seventhh [sic] Circuit has observed in a similar context, "hyper-technicality reigns" in TILA lawsuits. *See Cowen v. Bank United of Texas,* FSB, 70 F.3d 937, 941 (7th Cir. 1995).

b. Johnson's ability to recover statutory damages for violations of the TILA.

The defendants also contend that Johnson's TILA claims fails as a matter of law because he has failed to allege that he suffered any actual damages as a result of the defendants' apparent violation of the Act's the disclosure requirements. However, as countless circuit courts have noted, the

> TILA is a prophylactic measure that creates a system of "private attorneys general" to aid its enforcement. In order to penalize non-complying creditors and to deter future violations, the private attorneys general may recover the statutory penalties even if they have not sustained any actual damages or even if the creditors are guilty of only minute deviations from the

> requirements of [the] TILA and implementing Regulation Z.

See, e.g., Davis v. Werne, 673 F.2d 866, 869 (5th Cir. 1982); *see also Gambardella v. G. Fox & Co.*, 716 F.2d 104, 108 n.4 (7th Cir. 1983) ("It is well settled . . . that proof of actual deception or damages is unnecessary to a recovery of statutory damages under 15 U.S.C. § 1640(a)."); *Dryden v. Lou Budke's Arrow Fin. Co.*, 630 F.2d 641, 647 (8th Cir. 1980) ("TILA plaintiffs . . . need not show that they have sustained actual damages stemming from the TILA violations . . . before they can recover . . . statutory damages. . . . ").

While the defendants claim that Congress effectively overruled these decisions when it amended the statute to limit a creditor's exposure to the statutory damages provision relating to certain disclosure violations, the court disagrees.

i. The express language of the statute.

In 1980, when it was reforming the TILA to simplify its disclosure requirements, Congress also adopted an amendment which was "Intended to restrict the scope of creditor civil liability for statutory penalties to only those disclosures which are of material importance in credit shopping." *See* Sen. Rept. No. 96-73, at 17 (*reprinted in* 1980 U.S. Code Cong. & Admin. News, at 280, 294). According to Congress, it "believed that this [measure] would culminate litigation based on purely technical violations of the Act." *Id.* In relevant part, this amendment provided that:

> In connection with the disclosures referred to in [Section 1638 of this Title], a creditor shall have liability determined under paragraph (2) [the statutory damages provision] only for failing to comply with the requirements . . . of paragraph (2) (insofar as it requires disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of [Section 1638(a)]. . . .

See The Truth In Lending Simplification and Reform Act, Pub. L. No. 96-221, § 615(b), 94 Stat. 168, 181 (1980) (codified as amended at 15 U.S.C. § 1640(a) (1994)).

The specific paragraphs of Section 1638 listed in the amendment require a creditor to make the following disclosures:

> (2) The "amount financed," using that term, which shall be the amount of credit of which the consumer has actual use. . . .
>
> (3) The "finance charge," not itemized, using that term.
>
> (4) The finance charge expressed as an "annual percentage rate," using that term. . . .
>
> (5) The sum of the amount financed and the finance charge, which shall be termed the "total of payments."
>
> (6) The number, amount, and due dates or periods of payments scheduled to repay the total of payments. . . . [and]
>
> (9) Where the credit is secured, a statement that a security interest has been taken in (A) the property which is purchased as part of the credit transaction or (B) property not purchased

as part of the credit transaction identified by item or type.

See 15 U.S.C. § 1638(a)(2)(A), (3)-(6), (9).

Noting that Section 1638 expressly "refer[s] to" the disclosure of the "annual percentage rate" and the "finance charge," the defendants claim that Section 1640 therefore limits their liability to only those damages which Johnson actually suffered. *See* 15 U.S.C. § 1640(a). However, Section 1638 only requires a creditor to set forth these specific terms along with explanations which describe them, 15 U.S.C. § 1638(a). Nowhere does Section 1638 require these terms to be "disclosed more conspicuously than other terms, data, or information provided in connection with a transaction." *See* 15 U.S.C. § 1632(a). Instead, this disclosure requirement is found in Section 1632. Thus, it does not appear that the specific violation alleged by Johnson is "in connection with the disclosures referred to in Section 1638" as required by Section 1640. *See* 15 U.S.C. § 1640(a). As previously stated, this violation instead appears to be in connection with the disclosures referred to in Section 1632. As a result, the defendants seem to fall outside the express exception which Congress provided.

Furthermore, even if the disclosures at issue fell solely within the scope of Section 1638 because Johnson was engaging in a transaction "other than an open end credit plan," *see* 15 U.S.C. § 1638, the court notes that the disclosure requirements set forth in Section 1632 expressly state that "the terms 'annual percentage rate' and 'finance charge' shall be disclosed more conspicuously than other terms, data, or information provided in

connection with a transaction. . . . " 15 U.S.C. § 1632(a). Since Section 1632 precedes Section 1638, the court presumes that Congress intended a violation of Section 1632(a) to be treated as a violation of Section 1638(a)(3) and 1638(a)(4). *But see Laws*, 1999 WL 966964, at *3 n.2. This conclusion is supported by the legislative history.

ii. The statute's legislative history.

In 1980, Congress enacted Sections 1632 and 1640 simultaneously. As previously explained, Section 1632 replaced the previous "clearly and conspicuously" standard, which had led to lengthy and confusing disclosure statements, with the "more conspicuously" standard in an effort to "provide the consumer with clearer credit information" and to "make creditor compliance easier." *See* Sen. Rept. No. 96-73, at 2 (*reprinted in* 1980 U.S. Code Cong & Admin. News, at 280). As a result, it would seem odd to conclude that this disclosure was not "of material importance in credit shopping." *See* Sen. Rept. No. 96-73 at 17. In fact, as the Eleventh Circuit has noted,

> The terms "finance charge" and "annual percentage rate" are among the *material* terms affecting credit shopping and are protected by civil liability. Where these terms . . . are not printed more conspicuously than other terminology on the Truth-In-Lending disclosure statement, the violation is a *serious* one which entitles the plaintiffs to recovery.

See Shroder, 729 F.2d at 1380 (emphasis added) (citing *Dixey*, 677 F.2d at 752).

Thus, while Congress did intend to "eliminate litigation based on purely technical violations of the Act" when it enacted Section 1640, the court would be hard pressed to conclude that the violations alleged by Johnson fall into this category.

Consequently, in the event that Johnson establishes a violation of the disclosure requirements, his recovery is limited only by provisions of subsections (2)(A) and (2)(B) which respectively cap individual and class action awards at "twice the amount of any finance charge in connection with the transaction" or "not . . . more that the lesser of $500,000 or 1 per centum of the net worth of the creditor" taking into account the "amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional." *See* 15 U.S.C. §§ 1640(a)(2)(A), 1640(a)(2)(B), 1640(a).

2. Johnson's EFTA claims.

In their motion to dismiss, the defendants contend that Johnson has not adequately plead his EFTA allegations. Moreover, they claim that, given the facts of this case, he cannot possibly plead a cause of action under the EFTA. As a result, they argue, Johnson's claims fail as a matter of law. Again, the court disagrees.

a. Johnson's allegations and their factual basis.

In his complaint, Johnson alleges that, as a condition for obtaining the loan, he was required to sign a waiver of his right to stop payment of any "pre-authorized electronic fund transfers" out of an account created for him by the defendants. In response to these allegations, the defendants contend that the loan to Johnson "did not involve a pre-authorized electronic fund transfer" as defined by the EFTA. Noting that the Act defines these transfers as ones that are "authorized in advance to recur at substantially regular intervals," *see* 15 U.S.C. § 1693a (1994), the defendants distinguish the transfer arrangement at issue here since the loan only authorized the defendants to "effect a debit entry" of "one payment" from Johnson's account. As a result, the defendants contend, this transfer cannot "recur at substantially regular intervals."

Johnson responds by pointing out that his loan is very likely to "roll over" and, thus, "it is completely possible, and even likely, that a pre-authorized debt in this case would 'recur at substantially regular intervals.' " However, the defendants point out that even if Johnson re-financed his old loan through a new roll over, he would have to enter into a new loan agreement. Thus, even though this new agreement (like the old one) would authorize the defendants to "effect a debit entry" of "one payment" from Johnson's account, the defendants would still "make only one electronic funds transfer per note" and thus remain in technical compliance with the EFTA since the transfers, while possibly "recurring at substantially regular intervals," would occur on different notes.

b. This literal interpretation of the statute would offend the law's primary purpose.

Were the court to adopt the defendant's literal interpretation of the term "pre-authorized electronic fund transfer," the EFTA's "primary objective," which "is the provision of individual consumer rights," would be undermined. *See 15 U.S.C. § 1693*(b) (1994). Thus, while Johnson literally only authorizes the defendants to "effect a debit entry" of "one payment" from his account every time he rolls over his loan, the "pre-authorized electronic fund transfer" arguably "recur[s] at substantially regular intervals" as a direct result. Therefore, the court will deny the defendants' motion to dismiss as it relates to Johnson's claims under the EFTA.

3. Johnson's claims for a declaratory judgment.

Finally, in his complaint, Johnson asks this court to declare that both the rate of interest on his loan and the arbitration clause contained within the loan agreement are unconscionable. The defendants have sought the dismissal of these claims as well.

a. The rate of interest.

With respect to the first claim, the defendants argue that because unconscionability is a defense to a contract action, there is no actual controversy before the court in which to issue a declaratory judgment since Johnson has failed to allege that anyone has attempted enforce the loan agreement. *See* 28 U.S.C. § 2201 (1994) (requiring the existence of an "actual controversy before the court can

exercise jurisdiction). There is little merit to this argument since, as the Tenth Circuit has observed, "a party to a contract is not compelled to wait until he has committed an act which the other party asserts will constitute breach but may [instead] seek relief by declaratory judgment and have the controversy adjudicated in order . . . [to] avoid the risk of damage or other untoward consequence[s]." *See Keener Oil & Gas Co. v. Consolidated Gas Util. Corp.*, 190 F.2d 985, 989 (10th Cir. 1951). In other words, the court should not require Johnson to breach his loan agreement in order to become the subject of a lawsuit so that he can then raise the defense of unconscionability.

Perhaps in anticipation of this conclusion, the defendants argue in the alternative that the annual percentage rate paid by Johnson is not unconscionable since it is "entirely legal." On this point, the defendants note that (1) the rate was disclosed to Johnson, (2) he was aware of it when he signed the agreement, and (3) he had the opportunity to reject the terms of the loan but did not. Given this opportunity to "take it or leave it," the defendants claim that the terms of the loan agreement are not "so one-sided as to be oppressive." *See Graham*, 565 A.2d at 912. This argument completely misinterprets the *Graham* decision.

In *Graham*, the Delaware Supreme Court *specifically* stated that "[a] contract of adhesion [like the loan agreement here] may be declared unenforceable, in whole or in part, if its terms are unconscionable within the meaning of . . . [Section] 2-302" of Title 6 of the Delaware Code. *Id.* As the *Graham* court explained, while "mere disparity between the bargaining power of parties to a contract will not support a finding of unconscionability," when a

"party with superior bargaining power use[s] it to take unfair advantage of his weaker counterpart" by providing terms that were "so one-sided as to be oppressive," then a finding of unconscionability is warranted *Id.*

Thus, even though the State of Delaware does not place a limit on the amount of interest or other charges a bank may charge, *see* Del. Code Ann. tit. 5, § 962 (1998), the court cannot conclude (given the present record) that (1) the defendants did not abuse their superior bargaining power by (2) drafting terms which were "so one-sided as to be oppressive" since Johnson has alleged that he was charged a rather exorbitant rate of interest – specifically, 917 percent per annum.

b. The arbitration clause.

As far as Johnson's second claim for a declaratory judgment is concerned, the arbitration clause contained within the loan agreement was not "so one-sided" as to be unconscionable. As the *Graham* court stated,

> while it is true that the [agreement] was presented to the [plaintiffs] on a 'take-it or leave-it' basis, we do not believe that the inclusion of an arbitration clause unfairly favored [the defendant]. If the arbitration mechanism established by the policy had been unfairly structured, a finding of unconscionability might be appropriate. However, since both parties have equal input into the selection of the arbitrators and since both parties are bound by the result, we find no inherent unfairness in the clause.

Id. at 912-13.

The court reaches the same conclusion here. While the arbitration clause might be unenforceable with respect to Johnson's TILA claims, the clause itself is not in any way oppressive. It does not unfairly structure the arbitration process by affording the defendants any procedural advantages in the arbitral forum. *See* Note 5 *infra*. Because this claim fails as a matter of law, the court will dismiss it.

IV. CONCLUSION.

Because compelling arbitration would effectively strip both the TILA and EFTA of their sting, the court will deny the defendants' motion to compel in order to ensure that creditors have a "meaningful incentive to comply" with the disclosure requirements of these Acts. In addition, the court will deny the defendants' motion to dismiss as it relates to Johnson's claims under the TILA and EFTA as well as for a declaratory judgment on whether the rate of interest on his loan was unconscionable. However, the court will grant the motion to dismiss as it relates to Johnson's claim that the arbitration clause is unconscionable since the terms of this agreement were not so one-sided as to be oppressive. The court will issue an order to this effect in conjunction with this opinion.

ORDER

For the reasons stated in its Opinion of this date. IT IS HEREBY ORDERED that:

1. The Motion to Stay Proceeding and Compel Arbitration (D.I. 7) filed by Defendants Tele-

Cash, Inc. and County Bank of Rehoboth Beach, Delaware is DENIED;

2. The Motion to Dismiss (D.I. 7) filed by Defendants Tele-Cash, Inc. and County Bank of Rehoboth Beach, Delaware is GRANTED IN PART and DENIED IN PART;

3. The claim seeking a declaratory judgment that the arbitration clause contained within the loan agreement signed by Plaintiff Terry Johnson is unconscionable is DISMISSED.

Date: 12/29/99

Gregory M. Sleet

UNITED STATES DISTRICT JUDGE

APPENDIX C

TITLE 9. ARBITRATION
CHAPTER 1. GENERAL PROVISIONS

9 USCS § § 1 (2000)

§ § 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions"; as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

TITLE 9. ARBITRATION
CHAPTER 1. GENERAL PROVISIONS

9 USCS § § 2 (2000)

§ § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

TITLE 9. ARBITRATION
CHAPTER 1. GENERAL PROVISIONS

9 USCS § § 3 (2000)

§ § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement,

shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

[sec]§ 1640. Civil liability [TILA § 130]

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of –

(1) any actual damage sustained by such person as a result of the failure;

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000 or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is

secured by real property or a dwelling, not less than $200 or greater than $2,000;

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability

determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

(b) **Correction of errors**

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) **Unintentional violations; bona fide errors**

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation, computer malfunction and programming,

and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be brought by the appropriate State attorney general in any appropriate United States district court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of

this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may –

(1) intervene in the action;

(2) upon intervening –

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607(b), section 1607(c), section 1607(e), or section 1611 of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or

approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) **Recovery for multiple failures to disclose**

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) **Offset from amount owed to creditor or assignee; rights of defaulting consumer**

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the

consumer brought by a person liable under this subchapter.

TITLE 15. COMMERCE AND TRADE
CHAPTER 41. CONSUMER CREDIT PROTECTION
ELECTRONIC FUND TRANSFERS

15 USCS § 1693m (1998)

§ 1693m. Civil liability

(a) Individual or class action for damages; amount of award. Except as otherwise provided by this section and section 910 [15 USCS § 1693h], any person who fails to comply with any provision of this title [15 USCS §§ 1693 et seq.] with respect to any consumer, except for an error resolved in accordance with section 908 [15 USCS § 1693f], is liable to such consumer in an amount equal to the sum of –

(1) any actual damage sustained by such consumer as a result of such failure;

(2)(A) in the case of an individual action, an amount not less than $ 100 nor greater than $ 1,000; or

(B) in the case of a class action, such amount as the court may allow, except that (i) as to each member of the class no minimum recovery shall be applicable, and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same person shall not be more than the lesser of $ 500,000 or 1 per centum of the net worth of the defendant; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

(b) Factors determining amount of award. In determining the amount of liability in any action under subsection (a), the court shall consider, among other relevant factors –

(1) in any individual action under subsection (a)(2)(A), the frequency and persistence of noncompliance, the nature of such noncompliance, and the extent to which the noncompliance was intentional; or

(2) in any class action under subsection (a)(2)(B), the frequency and persistence of noncompliance, the nature of such noncompliance, the resources of the defendant, the number of persons adversely affected, and the extent to which the noncompliance was intentional.

(c) Unintentional violations; bona fide error. Except as provided in section 910 [15 USCS § 1693h], a person may not be held liable in any action brought under this section for a violation of this title [15 USCS §§ 1693 et seq.] if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error.

(d) Good faith compliance with rule, regulation, or interpretation of Board or approval of duly authorized official or employee of Federal Reserve System. No provision of this section or section 916 [15 USCS § 1693n] imposing any liability shall apply to –

(1) any act done or omitted in good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor; or

(2) any failure to make disclosure in proper form if a financial institution utilized an appropriate model clause issued by the Board, notwithstanding that after such act, omission, or failure has occurred, such rule, regulation, approval, or model clause is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(e) Notification to consumer prior to action; adjustment of consumer's account. A person has no liability under this section for any failure to comply with any requirement under this title [15 USCS §§ 1693 et seq.] if, prior to the institution of an action under this section, the person notifies the consumer concerned of the failure, complies with the requirements of this title [15 USCS §§ 1693 et seq.], and makes an appropriate adjustment to the consumer's account and pays actual damages or, where applicable, damages in accordance with section 910 [15 USCS § 1693h].

(f) Action in bad faith or for harassment; attorney's fees. On a finding by the court that an unsuccessful action under this section was brought in bad faith or for purposes of harassment, the court shall award to the defendant attorney's fees reasonable in relation to the work expended and costs.

(g) Jurisdiction of courts; time for maintenance of action. Without regard to the amount in controversy, any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

APPENDIX D

SAMPLE ARBITRATION CLAUSES IN OTHER "PAYDAY" LOANS

Check into Cash of Indiana, LLC, dba Check into Cash, 10075 E. Washington St., Indianapolis, IN 46229, (547.50% APR)

"ARBITRATION. Any controversy, claim or dispute arising out of or relating to this Agreement, or the breach thereof, whether sounding in tort, contract or otherwise shall be settled pursuant to the Indiana Arbitration Act, I.C. § 34-4-1-1, *et seq.*, upon the complaining party submitting to the other party in writing an explanation of the claim and a demand that the claim be resolved by arbitration. If the other party does not respond to the submittal in writing within ten (10) days of its receipt, the claimant may pursue this claim through arbitration, court action or other means otherwise available. The arbitration shall be conducted by a single arbitrator selected by agreement between the parties hereto, or by petitioning the Indiana superior or circuit court to select the arbitrator if no agreement on the selection of an arbitrator can be reached by mutual agreement of the parties. Each party shall bear the costs of their own respective attorneys' fees in connection with any arbitration hereunder, and all costs and expenses other than attorneys' fees will be paid in accordance with the award issued by the arbitrator. Any and all damages awarded by the arbitrator shall be subject to confirmation by any court of the State of Indiana or any federal court located therein having proper jurisdiction."

Check 'n Go of Illinois, Inc., 2317 S. Cicero Ave., Chicago, IL 60804 (521.43% APR)

"*Arbitration Provision*. . . . There shall be no authority for any claims to be arbitrated on a class action basis. . . . " *[Note: This is found in the middle of a two-paragraph, twenty-seven line arbitration clause.]*

National Money Service, Inc. 1156 W. 103d St., Ste 201, Kansas City, MO 64114 (APR allegedly not disclosed but estimated to be 780%)

"*Arbitration* You and we agree that any claim, dispute or controversy between us any claim either of us against the other (or the agents, servicers or assigns of the other including the company) and any claim arising from or relating to the agreement no matter by whom or against whom made including the validity of this agreement to arbitrate disputes as well as claims alleging fraud or misrepresentation shall be resolved by binding arbitration by and under the code of procedure of the National Arbitration Forum. . . . "

Hoosier Check Cashing of Ohio, Ltd., 2839 E. State Blvd., Ft. Wayne, IN 46805 (260.71% APR)

"ARBITRATION. To pursue any claim, demand dispute or cause of action ("claim") arising under this Agreement or any breach or default thereof, the claimant must submit to the other party in writing an explanation of the claim and a demand that the claim be resolved by arbitration. If the other party does not respond to the submittal

in writing within ten (10) days of its receipt, the claimant may pursue the claim though [sic] arbitration, court action or any other means otherwise available. If the other party responds to the submittal in writing within ten (10) days of its receipt, the claim must be submitted to binding arbitration in accordance with the rules of the Uniform Arbitration Act approved by the National Conference of Commissioners on Uniform State Laws of the American Bar Association, as amended. The arbitration shall be conducted by a single independent arbitrator selected by Check $mart and conducted in the county where this Agreement was signed. The expenses of the arbitration, including attorney's fees, will be paid in accordance with the award issued by the arbitrator."

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(2)

Supreme Court, U.S.
FILED

DEC 27 2000

OFFICE OF THE CLERK

No. 00-846

IN THE

Supreme Court of the United States

TERRY JOHNSON,

Petitioner,

v.

TELE-CASH, INC. and COUNTY BANK OF REHOBOTH BEACH, DELAWARE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

WALTER WEIR, JR.
Counsel of Record
SUSAN VERBONITZ
WEIR & PARTNERS LLP
Attorneys for Respondents
1339 Chestnut Street
Suite 500, The Widener Building
Philadelphia, Pennsylvania 19107
(215) 665-8181

164307

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

23 pp

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The caption of this case in the Court of Appeals for the Third Circuit is *Terry Johnson v. West Suburban Bank, Tele-Cash, Inc. and County Bank of Rehoboth Beach, Delaware*, No. 00-5047. The Petitioner correctly asserts that the parties are:

Terry Johnson, Plaintiff-Petitioner ("Johnson")

Tele-Cash, Inc., Defendant-Respondent ("Tele-Cash")

County Bank of Rehoboth Beach, Delaware, Defendant-Respondent ("County Bank")

Upon motion filed by Johnson in the district court, and by order dated May 19, 1999, all claims asserted against West Suburban Bank were dismissed with prejudice.

Pursuant to Rule 29.6, Tele-Cash and County Bank state that there is no parent or publicly held company that owns 10% or more of the stock of these corporations.

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COUNTER-STATEMENT OF THE CASE

The facts of this case are not complicated and, for the most part, are accurately set forth by Johnson. Johnson did request and receive from County Bank a short term, single advance, unsecured loan in the amount of $250 which was evidenced by a Note And Disclosure Statement dated July 10, 1998 (the "Note"). The Note contained an arbitration agreement under the terms of which Johnson and County Bank voluntarily agreed that any claim or dispute arising from or relating to the Note, including claims regarding the validity of the Note and the agreement to arbitrate disputes, shall be resolved by binding arbitration by and under the Code of Procedure of the National Arbitration Forum ("NAF"). The parties agreed that the arbitration agreement was made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (the "FAA"). Johnson does not dispute that the arbitration agreement is governed by the FAA; that is not an issue before this Court.

Johnson is, however, mistaken when he states that his loan was conditioned upon repayment by means of an electronic funds transfer, which is prohibited under the Electronic Funds Transfer Act (the "EFTA"), 15 U.S.C. § 1693k. Repayment of the loan by Johnson did not involve the type of recurring electronic fund transfer that is prohibited by the EFTA and Regulation Z, 12 C.F.R. § 205.2(k). Repayment of Johnson's loan was to be effected through a single, pre-authorized debit to Johnson's bank account by either a debit entry or a check drawn against an account designated by Johnson. The manner of repayment of the loan is nonetheless irrelevant because the merits of Johnson's claims are not before this Court.

Johnson also incorrectly states that his loan "would be repeatedly rolled over." A "rollover" occurs when the maturity date is extended on an existing loan. No new disclosures are provided in a rollover as none are required by law. County Bank's short term loans are not "rollover" loans which occur without executing new loan documents or providing new loan disclosures. *See* 12 C.F.R. § 226.20(a). When payment becomes due, the borrower has the following payment options: (1) pay the loan and finance charge in full; (2) pay the finance charge and make partial payment of the principal loan amount and refinance the balance pursuant to the terms of a new loan note and disclosure statement, or (3) pay the finance charge and refinance the entire principal loan amount by executing a new loan note and disclosure statement. Under options two and three, the existing obligation is satisfied and replaced with a new obligation. New disclosures are made and a new finance charge is imposed. These transactions are not "rollovers" but constitute the refinancing of existing obligations as defined under Regulation Z, 12 C.F.R. § 226.20(a), for which new disclosures are required and provided.

Johnson contends that County Bank's standard form notes do not comply with the provisions of the Truth-in-Lending Act (the "TILA"), 15 U.S.C. §§ 1630 and 1632, because the Annual Percentage Rate and Finance Charge disclosures were not more conspicuous than other required conspicuous disclosures. This relates to the remedies available under the TILA, not the enforceability *vel non* of the arbitration clause. In fact, the particular "conspicuousness" violation pled by Johnson is not such a material violation that would entitle Johnson or the putative class to statutory damages. *See* 15 U.S.C. § 1640(a)(2); *see also Brown v. Payday Check Advance, Inc.*, 202 F.3d 987 (7th Cir. 2000).

The United States District Court for the District of Delaware did not find that the arbitration agreement was unconscionable. *Johnson v. West Suburban Bank*, 82 F. Supp.2d 264, 268 (D. Del. 2000). Nor was the arbitration agreement found to be so one-sided as to be oppressive even though a contract of adhesion. *Id.* Rather, the district court found that there was an "inherent conflict" between compelling arbitration and the underlying purposes of the TILA and the EFTA when an action was brought on behalf of a class of affected consumers. *Id.* at 271.

Using the framework established by this Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Third Circuit reversed the district court finding no irreconcilable conflict between arbitration and the goals of the TILA or the EFTA. *Johnson v. West Suburban Bank*, 225 F.3d 366 (3d Cir. 2000). While recognizing as logical Johnson's argument that a class action award acts as a penalty against lenders who violate the TILA, the Third Circuit found that the rights created by the TILA remain available to an individual and are capable of vindication in an arbitration forum. As the Third Circuit explained, the loss of the availability of a class action in arbitration does not mean the loss of any substantive right or frustrate the purposes and goals of the TILA. *Id.* at 373, 374.

REASONS FOR DENYING THE WRIT

I. THE *JOHNSON* DECISION DOES NOT INVOLVE A QUESTION OF EXCEPTIONAL IMPORTANCE.

The *Johnson* decision does not involve a question of exceptional importance for this Court to decide. It presents an issue that has been decided adversely to Johnson many times in similar contexts by this and other courts.[1] *See Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987); *Gilmer v. Interstate /Johnson Lane Corporation*, 500 U.S. 20 (1991); *Rodriguez De Quijas v. Shearson/ American Express, Inc.*, 490 U.S. 477 (1989); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110 (3d Cir. 1993); *Bowen v. First Family Financial Services, Inc.*, 2000 U.S. LEXIS 29621 (11th Cir. 2000).

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1. [W]e agree with the other courts that have addressed this issue. *See Johnson*, 225 F.3d at 378 n. 5; *Wood*, 102 F. Supp.2d at 1350; *Thompson v. Illinois Title Loans, Inc.*, F. Supp.2d, 2000 U.S. Dist. LEXIS 232 (N.D. Ill. 2000). We hold that, for purposes of the ECOA, specifically 15 U.S.C. §§ 1691(a)(3), Congress did not create a non-waivable right to pursue TILA claims in a judicial forum, either individually or through a class action. It follows that the plaintiffs cannot show that when First Family required them to sign an agreement to arbitrate any claims arising under the TILA, it discriminated against the plaintiffs in violation of §§ 1691(a)(3) because they had exercised a right under the Consumer Credit Protection Act.

Bowen v. First Family Financial Services, Inc., 2000 U.S. LEXIS 29621 (11th Cir. 2000) at page 19.

While the lower court's decision was the first Circuit Court to address the issue of whether there is an inherent conflict between the TILA and EFTA and arbitration, the Eleventh Circuit has recently reached the same result in the context of an Equal Credit Opportunity Act claim and held that there is no inherent conflict between TLIA and arbitration. *Bowen, supra.*[2] More importantly, the Third Circuit's decision in favor of Tele-Cash and County Bank does not conflict in any material respect with well settled principles of law applicable to the resolution of this issue.[3]

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2. [W]e recognize, of course, that a class action is an available, important means of remedying violations of the TILA. See 15 U.S.C. §§ 1640. "However, there exists a difference between the availability of the class action tool, and possessing a blanket right to that tool under any circumstance." [citation omitted]. An intent to create such a "blanket right," a non-waivable right, to litigate by class action cannot be gleaned from the text and the legislative history of the TILA.

(Citation omitted). *Id.* at page 16.

3. In a factually similar case, *Green Tree Financial Corporation v. Randolph*, 531 U.S. __, No. 99-1235, 2000 U.S. Lexis 8279 (December 11, 2000), this Court recently addressed a related issue of whether an arbitration agreement is *per se* unenforceable because it fails to affirmatively protect a party from potentially steep arbitration costs (ruling in favor of the lender). In her dissenting opinion, Justice Ginsburg, noting that Randolph alternatively argued for affirmance on the ground that the arbitration agreement was unenforceable because it precluded pursuit of a statutory claim as a class action, stated that she did not read the Court's opinion to preclude resolution of that question by the Eleventh Circuit. Given the Eleventh Circuit's observations on this issue in the *Bowen* case, it seems highly unlikely that the Eleventh Circuit would not rule consistent with the Third Circuit in this case.

II. THE PRINCIPLES OF *GILMER* ARE APPLICABLE TO THIS CASE.

Johnson argues that his case should be exempt from this Court's holding in *Gilmer* because the plaintiff in *Gilmer* was not paying for the arbitration. While it is true that Johnson *may* be required to pay a fee under the arbitration agreement at issue in this case, that fee is modest and may be waived where the consumer is indigent.[4] The National Arbitration Forum ("NAF"), before which all arbitration claims must be filed under the arbitration agreement at issue in this case, has a comprehensive set of rules governing procedures and costs of arbitration. The minimum filing fee for small claims brought by consumers is $49. *See* Appendix A, Code of Procedure of the NAF, Appendix C. Telephonic and in-person hearing fees on consumer claims range from $50 to $75. *Id.* A consumer who is indigent and cannot afford to pay fees may request that the fees be waived. *See* Rule 45 of the NAF. A prevailing party may also recover his/her costs. *See* Rule 44 E of the NAF.

For these reasons, Petitioner Johnson's argument on the obligation to pay fees and costs is of no avail in this case.

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4. The NAF arbitration forum was subject to extensive review and approved by the district court in *Marsh v. First USA Bank, N.A.*, 103 F. Supp.2d 909 (N.D. Tex. 2000), which also rejected plaintiff's argument that he could not be compelled to arbitrate claims because doing so forced him to forgo his right to proceed as a class action.

III. THERE IS NO INHERENT CONFLICT BETWEEN THE AGREEMENT TO ARBITRATE AND THE TILA AND EFTA.

Johnson argues that *Gilmer* is distinguishable because in this case he was required to give up his right to proceed as a class action. This is not, however, a distinguishing factor. This very argument was raised and rejected by this Court in *Gilmer*. The fact that an arbitration agreement makes no provision for class action relief does not in and of itself render the arbitration agreement unenforceable.[5] As noted by the Third Circuit, "The notion that there is a meaningful distinction between vindicating a statute's social purposes and adjudicating private grievances for purposes of determining whether a statute precludes compelling arbitration under a valid arbitration clause was rejected by [this Court] in [Gilmer] [citation omitted]". *Johnson*, 225 F.3d at 374.

Petitioner Johnson erroneously argues that TILA and EFTA specifically provide for civil fines in class actions and that this remedy is not available in arbitration. Civil fines and punitive damages may in fact be awarded in arbitration. A claimant in arbitration may obtain the same relief that is available in a judicial forum. The only difference is that a claimant does not have the procedural right to seek class

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5. Unless an arbitration agreement provides for class actions, a court may not order an arbitration to proceed as a class action. *Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269 (7th Cir. 1995) (citing the Second, Fifth, Sixth, Eight, Ninth and Eleventh Circuit decisions that hold that, absent the parties' agreement, the district court is without power to order consolidated arbitrations); *see also Zawikowski v. Beneficial National Bank*, 1999 WL 35304 (N.D. Ill. Jan. 11, 1999).

action status. It is clear, therefore, that a claimant is not deprived of any remedy in arbitration except the possible procedural right of proceeding on behalf of other claimants.

Johnson's right to obtain the full range of remedies available under TILA and EFTA may not be gainsaid. Rule 20(d) of the NAF authorizes arbitrators to "grant any remedy or relief allowed by applicable substantive law and based on a Claim, Response, or Request properly submitted by a Party under this Code." *See* Appendix A, Rule 20 of the NAF. Because Johnson "effectively may vindicate" his claims under both the TILA and EFTA in arbitration, these statutes "will continue to serve both [their] remedial and deterrent functions." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 472 U.S. 614, 637 (1985).

This Court has made clear that the presumption in favor of arbitration established by the FAA is a powerful one. "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi*, 472 U.S. at 628. The burden of establishing that Congress meant to preclude arbitration rests with the party who seeks to avoid arbitration. *Gilmer*, 500 U.S. at 26. Any such inquiry must give deference to the federal policy favoring arbitration. An intention to preclude arbitration must be found in the text of the statute, its legislative history or in an "inherent conflict" between arbitration and the statute's underlying purposes. *Id.* The district court rested its finding on the third category, and found a conflict on the conclusion that "without the possibility of class action liability looming on a creditor's horizon, there is a very real possibility that these entities will not voluntarily comply with the Truth-in-Lending regulations." *Johnson*, 82 F. Supp.2d at 271.

The Third Circuit's reversal of this conclusion is based on two observations. First, the TILA's and EFTA's public policy goals are not undermined by arbitration since class actions are not necessary to provide deterrence or fulfill any of the other goals of these acts. *Johnson*, 225 F.3d at 373-375. Second, the TILA and EFTA do not create an unwaivable right to bring a class action. *Id.* at 377.

Indeed, the class action damage provisions of § 1640 of the TILA does not manifest a congressional intent to make class actions the primary relief under the TILA, nor do they establish a statutory right to class action relief. Section 1640 is a limitation on damages that may be awarded in a class action. *Lopez v. Plaza Financial Co.*, 1996 WL 210073 (N.D. Ill. April 25, 1996). Such provisions restricting class recovery do not embrace a congressional intent to make "private attorney generals" the primary mechanism for enforcement of the TILA or the EFTA through class actions.[6] This is

6. The authorities cited by Johnson do not support his argument that Congress intended the enforcement of the TILA to be accomplished by "private attorney generals" suing in a judicial forum. In *Broughton v. Cigna Healthplans of California*, 988 P.2d 67 (Cal. 1999), the court rejected the plaintiff's argument that her statutory claim under the Consumer Legal Remedies Act was not subject to arbitration. Although the court refused to refer a demand for injunctive relief to arbitration, it did so on the narrow grounds that the injunction sought was beyond the arbitrator's power to impose. *Thomas v. Myers-Dickson Furniture Company*, 479 F.2d 740 (5th Cir. 1973) and *James v. Home Construction Company of Mobile, Inc.*, 689 F.2d 1357 (11th Cir. 1982) held only that an award of attorney's fees under the TILA allows the claimant to participate in the policing of the TILA and is consistent with the notion of enforcement by "private attorney generals." The remedies available to Johnson in an NAF forum include statutory and punitive damages, declaratory and injunctive relief, as well as attorneys' fees. *See* Rule 20 of the Code of Procedure of the NAF.

evident by the many other legislative and regulatory enforcement mechanisms that are designed to foster compliance with the TILA, the EFTA, and other federal consumer protective laws and regulations. *See Johnson*, 225 F.3d at 375; *see also Bowen, supra.*

The Third Circuit's analysis and the reasoning applied to reach the result it did is not at odds with any precedent of this Court and does not conflict with any other Circuit Court. Nor does it conflict with the text or the legislative histories of the TILA or the EFTA.

CONCLUSION

For the reasons set forth above, Tele-Cash and County Bank respectfully request that this Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

WALTER WEIR, JR.
Counsel of Record
SUSAN VERBONITZ
WEIR & PARTNERS LLP
Attorneys for Respondents
1339 Chestnut Street
Suite 500, The Widener Building
Philadelphia, Pennsylvania 19107
(215) 665-8181

APPENDIX A — CODE OF PROCEDURE OF THE NAF

NATIONAL ARBITRATION FORUM CODE OF PROCEDURE

July 1, 2000

* * * *

PART IV
ARBITRATORS

Rule 20. Authority of Arbitrators.

A. Arbitrators have the powers provided by this Code, the agreement of the Parties, and the applicable substantive law.

B. Arbitrators shall take an oath prescribed by the Director and shall be neutral and independent.

C. Arbitrators shall decide all arbitrable issues submitted by the Parties and do not have the power to decide matters not properly submitted under this Code.

D. Arbitrators may grant any remedy or relief allowed by applicable substantive law and based on a Claim, Response, or Request properly submitted by a Party under this Code.

Appendix A

PART VII
FEES

Rule 44. Fees.

A. A Party may not file a Claim or proceed with an arbitration unless the fees provided in the Fee Schedule are timely paid to the Forum. Fees are not refundable except as otherwise provided by the Code.

B. The Forum may not file an arbitration, Claim, Response, Request, demand or notice if the fee required by the Fee Schedule does not accompany the submission.

C. The Forum may not schedule a Document Hearing or a Participatory Hearing if the fee required by the Fee Schedule does not accompany the Request for the hearing.

D. During the course of a Participatory Hearing, the Director may require the Party or Parties, who are not Consumers in Small Claim cases, to pay in advance a fee for additional Participatory Hearing sessions in addition to those requested under Rule 26 and 27. Unexpended fees shall be returned to the Party or Parties making payment.

E. The prevailing Party may recover fees paid in the arbitration in accordance with Rule 37C.

F. Issues regarding the amount of filing fees, including the value of relief sought, may be raised by any Party and shall be resolved by the Director or by an Arbitrator.

Appendix A

Rule 45. Waiver of Fees.

A. An indigent Party, who is not an individual and not a business or other entity, may request a waiver of the Small Claim filing or administrative fees, Request fees, hearing fees, or other fees or security for any arbitration by filing with the Director a written Request for a waiver at the time the fee payment is due. The Request for a waiver shall be accompanied by an affidavit of indigency stating the Party's family size and all income and sources, property and assets, expenses and costs, liabilities and debts, and other relevant information. Neither the Request nor affidavit need be sent to other parties.

B. The Director shall promptly decide whether an individual Party is eligible under this Rule and under United States federal poverty standards.

C. If the statements in the affidavit of indigency are untrue, or if the Director later deems the individual able to pay the fees or security, the Director shall order the individual to pay.

D. If an individual proceeding under this rule recovers money by either a settlement or an Award, the opposing Party shall deduct the unpaid fee from the amount of the settlement or Award and pay the fee to the Forum. If the opposing Party fails to pay the unpaid fee to the Forum, the individual proceeding under this rule shall remain liable to pay the fee.

Appendix A

APPENDIX C
FEE SCHEDULE

Effective December 1, 1999

FILING FEES

These filing fees govern arbitrations conducted under the **Forum** *Code of Procedure*. Rules regulating fees appear throughout the *Code of Procedure*. All fees are in U.S. dollars.

FEES
SMALL CLAIMS BROUGHT BY CONSUMERS

These fees apply to claims for an amount less than US$15,000.00 made by a Consumer against any business or other entity that is not a Consumer.

Amount of Claim	Filing Fee	Administrative Fee
Less than US$5,000	US$49	US$225
Less than US$15,000	US$100	US$425
Non-monetary relief value of less than US$15,000	US$100	US$425

Consumer Small Claim Filing Fe The Consumer Claimant shall pay the Filing Fee at th ime the Claim is filed.

Consumer Small Claim Administrative Fee. The non-consumer Respondent shall pay the Administrative Fee at the time the response is filed.

Appendix A

Consumer Small Claim Document Hearing. The Administrative Fee covers the cost of a Document Hearing. There is no additional fee to the Consumer Claimant for a Small Claim Document Hearing.

Consumer Small Claim Telephone or On-line Participatory Hearing. The Consumer Claimant requesting a Telephone or On-line Participatory Hearing of a consumer Small Claim shall pay a hearing fee of US$50. Each other non-consumer party shall pay US$50 at the time of the request for a hearing.

A non-consumer party requesting a Telephone or On-line Participatory Hearing of any Small Claim shall pay a fee of US$100. Each other non-consumer party shall pay US$50 at the time of the request for a hearing. The Consumer Claimant will pay no hearing fee if the request is made by a non-consumer party.

Consumer Small Claim In-Person Participatory Hearing. A Consumer Claimant requesting an In-Person Participatory Hearing of a Consumer Small Claim shall pay a Hearing Fee of US$75. Each other non-consumer party shall pay US$100 at the time of the request for each Hearing session of a Consumer Small Claim. Rule 34 of the *Code of Procedure* sets the length of a Small Claim Participatory Hearing session at one hour, if the claim is less than US$5000, and at two hours, if it is US$5000 or more.

A non-consumer party requesting an In-person Participatory Hearing of a Consumer Small Claim shall pay a hearing fee of US$200 per session. The Consumer Claimant will pay no hearing fee if the request is made by a non-consumer party.

Appendix A

No Small Claim Fees. In Small Claim cases, Consumers do not pay fees for requests of subpoenas, discovery orders, or continuances.

Findings and Conclusions. A Consumer who requests findings, conclusions, or an explanation in a Small Claim case does not pay any fee for the request. Where findings of fact, conclusions of law, or reasons are required under Rule 37G, the non-consumer claimant or the non-consumer respondent shall pay a fee of US$150.

Recovery of Fees. The arbitrator may order the fees paid by a Party to be reimbursed by another Party.

No Fee. An individual who is indigent and cannot afford to pay a fee may not have to pay a Consumer Small Claim fee. This individual may request, in writing, that the Director waive the fee. Read Rule 45 of the *Code of Procedure*.

Questions? Need Help? Any party who has questions or needs help in filing or responding to a claim may contact the Director:

The Forum
P.O. Box 50191
Minneapolis, MN 55405-0191 USA
(651) 631-1105 (800) 474-2371
info@arb-forum.com
ARBITRATION-FORUM.COM